Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS.

II. WHETHER NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION.

RULE 29.1 STATEMENT OF INVOLVED PARTIES

Petitioner Outboard Marine Corporation (OMC) has no parent corporation. Its only subsidiary that is not wholly owned is Skipper Bud's of Illinois, Inc., which is owned 75% by OMC and 25% by Skipper Bud's of Wisconsin, Inc., a corporation unaffiliated with OMC.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

RULE 29.1 STATEMENT OF INVOLVED PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED . . . 3

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

REASONS FOR GRANTING THE PETITION 5

I. THE APPELLATE COURT HOLDING THAT FEDERAL MARITIME LAW DOES NOT APPLY TO THIS RECREATIONAL BOATING CASE MERITS REVIEW BY THIS COURT BECAUSE IT CONTRAVENES ESTABLISHED SUPREME COURT PRECEDENT, IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS, AND THUS THREATENS TO UNDERMINE THE UNIFORMITY MANDATED BY THE CONSTITUTION 5

A. This Court Has Recognized that the Constitutionally Mandated Interest in the Uniformity of Maritime Law Demands Rejection of a Fact-Dependent Analysis in Determining Whether Maritime Law Should Apply to a Given Case 6

B. The Appellate Court's Fact-Dependent Analysis and Holding in this Case Directly Contravene *Foremost* and *Sisson* and the State and Lower Federal Court Decisions Following Those Precedents 11

1. This Case Unmistakably Meets the Criteria of *Foremost* and *Sisson* 11

2. The Appellate Court Decision Conflicts with Other State and Federal Court Decisions in Cases Involving Recreational Boating Accidents 14

3. In Declaring that Maritime Law Does Not Apply to "Aquatic Recreation Involving a Pleasure Boat," the Appellate Court Improperly Invoked a Fact-Dependent Analysis Embraced by a Line of Cases Which Hold that Where an Anchored Vessel is Simply Being Used as a Floating

Platform, Maritime Law May Not be Implicated 15

C. The Appellate Court's Decision Poses a Threat to Uniformity That is of Substantial Practical Importance 18

II. MARITIME LAW PRECLUDES RECOVERY OF DAMAGES FOR LOSS OF SOCIETY TO THE NON-DEPENDENT SURVIVORS OF DECEDENT 20

A. Where Maritime Law is Applicable, it Preempts State Common Law and Statutory Remedies 21

B. Plaintiff May Not Recover Damages for Loss of Society in this Case Because Maritime Law Limits Recovery to Dependents of the Deceased 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases -- U.S. Supreme Court

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 2

Executive Jet Aviation, Inc. v.
City of Cleveland,
409 U.S. 249 (1972) 6-8, 11

Foremost Ins. Co. v. Richardson,
457 U.S. 668 (1982) . . . 7, 8, 11, 12, 15, 18, 24

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 22, 23

Moragne v. States Marine Lines,
398 U.S. 375 (1970) 5, 21-23

Sisson v. Ruby,
497 U.S. 358 (1990) 6, 8-18, 24

The Lottawanna,
88 U.S. (21 Wall.) 558 (1874) 5

Cases -- Other Courts

American Eastern Dev. Corp. v. Everglades Marina, 608 F.2d 123 (5th Cir. 1979) 15

American Nat'l. Bank & Trust Co. of Waukegan v. United States, 636 F. Supp. 147 (N.D. Ill. 1986) 16

Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990) 13, 14, 21

Banchi v. Miller, 388 F. Supp. 645 (E.D. Pa. 1974) 14

Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151 (S.D. Fla. 1992) 23

Complaint of Bird, 794 F. Supp. 575 (D.S.C. 1992) 14, 17

Delta Country Ventures v. Magana, 986 F.2d 1260 (9th Cir. 1993) 16, 17

Foster v. Petticord, 826 F.2d 1370 (4th Cir. 1987) *cert. denied*, 484 U.S. 1027 (1988) 16

Gilmore v. Witschorek, 411 F. Supp. 491 (E.D. Ill. 1976) 21

Hassinger v. Tideland Elec. Membership Corp., 781 F.2d 1022 (4th Cir.), *cert. denied*, 478 U.S. 1004 (1986) 14

In re Cambria Steamship Co., 353 F. Supp. 691 (N.D. Ohio 1973), *aff'd sub nom Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir. 1974), *and cert. denied*, 420 U.S. 975 (1975) 23

In re Colquitt, 1975 A.M.C. 981 (D. Md. 1975) 15

Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) 8

Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So. 2d 1151, (Fla. Dist. Ct. App.), *cert. denied*, 113 S. Ct. 465 (1992) 21, 23

Matter of S.S. Helena, 529 F.2d 744 (5th Cir. 1976) 21

Medina v. Perez, 733 F.2d 170 (1st Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) 14

Oliver v. Hardesty, 745 F.2d 317 (4th Cir. 1984) 14

Oman v. Johns-Manville Corp.,
764 F.2d 224 (4th Cir.),
cert. denied, 474 U.S. 970 (1985) 8

Sanders v. Richmond,
579 S.W.2d 401 (Mo. Ct. App. 1979) 21

Smith v. Knowles,
642 F. Supp. 1137 (D. Md. 1986) 16

St. Hilaire Moye v. Henderson,
496 F.2d 973 (8th Cir.)
cert. denied, 419 U.S. 884 (1974) 14

Texaco Refining and Marketing v.
Estate of Dau Van Tran,
808 S.W.2d 61, (Tex.),
cert. denied, 112 S. Ct. 301 (1991) 21, 23

Truehart v. Blandon,
672 F. Supp. 929 (E.D. La. 1987) . . . 4, 21, 23

Wahlstrom v. Kawasaki Heavy Industries,
4 F.3d 1084 (2d Cir. 1993) 12, 14, 22, 23

Wilder v. Placid Oil Co.,
611 F. Supp. 841 (W.D. La. 1985) 14

Constitutional Provisions

U.S. Const. Article III,
§ 2, cl. 1 3

Statutes/Regulations

28 U.S.C. § 1257(a) 2

46 U.S.C. app. § 688 (1988) 20, 22, 23

46 U.S.C. app. §§ 761-768 (1988) 20, 22, 23

92 Illinois Administrative Code,
Ch. I, § 704.Appendix A 18

Secondary Authorities

2 BENEDICT ON ADMIRALTY § 216 (1993) 13

Boating Statistics 1992, U.S. Dep't.
of Transp. -- U.S. Coast Guard
(June 1993) 18, 19

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

Petitioner Outboard Marine Corporation ("OMC") respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois (hereafter "the Appellate Court"), review of which was denied by the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Appellate Court (App., *infra*, A1-A7) is reported at 615 N.E.2d 86 (Ill. Ct. App. 1993). The Illinois Supreme Court's order denying OMC's petition for leave to appeal (App. A8) is unreported. The order of the Circuit Court for Madison County granting OMC's motion for partial summary judgment (App. A11) is also unreported.

JURISDICTION

The order of the Illinois Supreme Court denying OMC's timely filed petition for leave to appeal from the judgment of the Appellate Court was entered on October 6, 1993. (App. A8) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

This Court held in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the final judgment requirement is to be interpreted liberally so as to serve the legislative goal of permitting Supreme Court review of important federal questions that come up through the state court system. This case fits the fourth exception to the final judgment rule described in *Cox*, 420 U.S. at 482-86. The federal question presented has been finally decided by the Illinois state courts. If OMC prevails on the merits on non-federal grounds in subsequent proceedings in the trial court, there will not be another opportunity for this Court to review the federal issue. Moreover, reversal of the Appellate Court on the federal issue would preclude further litigation on plaintiff's claims for recovery on behalf of the decedent's non-dependent survivors. Finally, if the Appellate Court decision is not reviewed and reversed, the constitutionally-based policy of uniformity in the application of maritime law across the country will be eroded.

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2, cl. 1, of the United States Constitution provides in relevant part: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;. . . ."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This products liability action arises out of an accident that occurred on April 27, 1989, while plaintiff's decedent was a passenger on a pleasure boat which was being operated on the Mississippi River at or near mile marker 222 in St. Charles County, Missouri. The complaint alleges that the decedent, Stacey Grace, was ejected from the boat and struck by the propeller of the outboard motor, causing injuries which resulted in her death.

The decedent was 23 years old at the time of her death. She left no surviving spouse or children. The next of kin claiming an interest in this litigation are her father, David Woltering, and a sister, Sheila Martin. It is undisputed that decedent's next of kin were not at the time of her death dependent upon her for financial support.

Plaintiff David Woltering, as administrator of the Estate of Stacey Lee Grace, sued Outboard Marine Corporation ("OMC"), the manufacturer of the outboard motor, claiming that the outboard motor was defective because it lacked "a propeller guard or shroud." Plaintiff sought damages for wrongful death, including damages for deprivation of "decedent's companionship, guidance, advice,

love and affection."[1] Complaint, Counts I and III (App. A15-A18, A22-A25). OMC filed a motion for partial summary judgment on Counts I and III on the ground that federal maritime law governed the case and precluded recovery of damages for loss of society by non-dependents. The Circuit Court for Madison County, the Honorable A. A. Matoesian presiding, granted defendant's motion. (App. A11) Judge Matoesian further concluded, pursuant to Illinois Supreme Court Rule 308(a), that his ruling raised a question of law as to which there was substantial ground for difference of opinion, and that immediate appeal might materially advance the ultimate termination of the litigation. He defined that question of law as "whether Federal Admiralty Law governs and, if so, does general Maritime Law preclude recovery for loss of society damages in a wrongful death action based on products liability." (App. A9-A10)

The Appellate Court granted plaintiff's application for leave to appeal. On June 16, 1993, it reversed the trial court's order granting partial summary judgment, holding that federal maritime law did not apply to the case because "aquatic recreation involving a pleasure boat" did not have a "significant relationship to traditional maritime activity" where there was no evidence in the record "that negligent navigation played a role in the accident." 615 N.E.2d at 88-89 (App. A3, A5, A6). The Appellate Court did not reach the issue of whether federal maritime law, if applied, would

[1] For purposes of this petition, these elements of damages shall be collectively referred to as "loss of society," which embrace the broad range of mutual benefits a family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and affection. *See Truehart v. Blandon*, 672 F. Supp. 929, 932 (E.D. La. 1987).

preclude plaintiff's recovery for loss of society. The Illinois Supreme Court denied OMC's timely filed petition for leave to appeal from the Appellate Court judgment. (App. A8)

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT HOLDING THAT FEDERAL MARITIME LAW DOES NOT APPLY TO THIS RECREATIONAL BOATING CASE MERITS REVIEW BY THIS COURT BECAUSE IT CONTRAVENES ESTABLISHED SUPREME COURT PRECEDENT, IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS, AND THUS THREATENS TO UNDERMINE THE UNIFORMITY MANDATED BY THE CONSTITUTION.

This Court has long recognized the "constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970), *quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). The Court has also recognized the critical importance of its role in shaping that body of law and in guiding the state and federal courts as to the scope of its application.

The refusal of the Appellate Court to apply maritime law to this accident involving the death of a passenger thrown from and struck by a recreational boat on navigable waters is but the latest attempt by a lower court to carve out an exception to the uniform application of maritime law. The Appellate Court's declaration that maritime law does not govern a case involving "aquatic recreation involving a pleasure boat" in the absence of evidence of negligent

navigation, flies in the face of three decades of Supreme Court precedent rejecting attempts to limit the scope of maritime law in cases involving vessels on navigable waters. It is also directly contrary to several state and lower federal court decisions.

If the Appellate Court's decision is allowed to stand, the constitutionally mandated development of "uniform rules of maritime conduct and liability" which extend to all "activities traditionally undertaken by vessels, commercial or non-commercial," *Sisson v. Ruby*, 497 U.S. 358, 367 (1990), will be thwarted. For these reasons, review is essential to correct the insupportable holding of the Appellate Court and to assure that maritime law is applied uniformly in future litigation involving recreational boating.

A. This Court Has Recognized that the Constitutionally Mandated Interest in the Uniformity of Maritime Law Demands Rejection of a Fact-Dependent Analysis in Determining Whether Maritime Law Should Apply to a Given Case.

In 1972, this Court decided the first of a series of cases in which it reaffirmed the importance of a uniform body of maritime law, and sought to provide guidance to the lower courts in determining when that body of law should apply to a tort occurring on navigable waters. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the Court held that in order for maritime law to apply, the activities giving rise to the case must have a "nexus," *i.e.*, bear "a significant relationship," to "traditional maritime activity." *Id.* at 268.

Executive Jet spawned an entire generation of litigation which pondered just how much "nexus" was required. Some courts interpreted this test to mean that recreational boaters were excluded from the application of maritime law. But in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), which involved a collision between two small recreational boats on the Amite River in Louisiana, this Court rejected the attempted commercial/recreational distinction and declared the paramount interest of maritime law in any case that involved a collision on navigable waterways:

> . . . The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated *only* if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . .
>
> . . . We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime *commerce* is promoted when *all* vessel operators are subject to the same duties and liabilities.

Id. at 675-77 (emphasis in original).

Foremost did not, however, end the controversy among lower courts struggling to define the *Executive Jet* "nexus." Over the years the variety of analyses employed by the courts gave rise to more rather than less confusion

regarding the breadth of *Foremost*. See, *e.g.*, the four-factor test adopted in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), and *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.), *cert. denied*, 474 U.S. 970 (1985). Considerable judicial resources were spent delving into the factual intricacies in each case as the courts attempted to ascertain whether there was sufficient "nexus" to apply maritime law. Plaintiffs argued that Foremost should be limited to cases involving a navigational error or a collision. The plethora of inconsistent decisions that resulted threatened to undermine the constitutional goal of uniformity.

Accordingly, in *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court once again was called upon to clarify the scope and application of maritime law. *Sisson* involved a 56-foot pleasure sailboat docked at an entirely recreational marina on a navigable waterway in Lake Michigan. A fire erupted in the washer/dryer unit in the sailboat and destroyed Sisson's vessel as well as several neighboring recreational vessels and portions of the marina. This Court found maritime law applicable to the incident.

In so doing, the Court refined the two-part test it had announced in *Foremost*. It stated that the requisite analysis must focus on whether the *general type* of harm-producing event has a potentially disruptive effect on maritime commerce, and whether the *general type* of activity bears a significant relationship to maritime activity. 497 U.S. at 362-63.

Respondents in *Sisson* argued that the fire had no potential effect on maritime commerce because the boat was a recreational boat docked at a marina used entirely by

recreational boaters. The Court rejected this narrow "fact-specific" analysis:

> This argument misunderstands the nature of our inquiry. We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the actual effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the *Ultorian* more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an activity is likely to disrupt commercial activity.

Id. at 363. Thus, in analyzing the requirement of "potential disruptive impact on maritime commerce," the specific facts of the case were immaterial. Instead, the relevant inquiry was the "general features of the type of incident." It was not important that *Sisson* involved a "washer/dryer fire" but rather that it involved "a fire on a vessel docked at a marina on navigable waters."

With respect to the second part of the test, a significant relationship to traditional maritime activity, the Court once again emphasized the "broad perspective" demanded by its approach:

> Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. . . . Thus, in this case, we need not ascertain the precise cause of the fire to determine what "activity" Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters. [Footnote omitted.]
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> * * *
>
> . . . [A] narrow focus on navigation would not serve the federal policies that underlie our jurisdictional test. . . . The need for uniform rules of maritime conduct and liability is not limited to navigation but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

Id. at 364-65, 367.

Thus, the Court found maritime law to apply even though (a) the boat was recreational rather than commercial, (b) the boat was not moving or navigating, (c) the dock was located at an entirely recreational marina, (d) there was no collision, and (e) the origin of the fire appeared to be a garden variety household appliance. In short, the Court "eschew[ed] the fact-specific jurisdictional inquiry" that had enmeshed the lower courts and had artificially limited the

proper scope of maritime law application. *Id.* at 364.[2] In its place, the Court embraced a broad perspective consonant with its commitment to uniformity in this area.

B. The Appellate Court's Fact-Dependent Analysis and Holding in this Case Directly Contravene *Foremost* and *Sisson* and the State and Lower Federal Court Decisions Following Those Precedents.

Lower court rulings which have taken *Foremost* and *Sisson* to heart have rejected invitations to conduct a fact-dependent analysis and have built a consistent record on the application of maritime law where the accident involves a recreational vessel on navigable waterways. However, the decision of the Appellate Court that maritime law will not be applied to this boating accident defies this Court's decisions and directly conflicts with the decisions of other state and lower federal courts.

1. This Case Unmistakably Meets the Criteria of *Foremost* and *Sisson*.

In the present case, the decedent, a passenger on a pleasure boat, was fatally injured when she was thrown or fell overboard and was struck by the propeller of the boat's outboard motor. Application of the *Foremost/Sisson* two-part analysis mandates the conclusion that maritime law must apply.

[2] In fact, the struggle of the lower courts even caused some on the *Sisson* court to suggest a return to the pre-*Executive Jet* locality test, under which any tort occurring on navigable waters was considered subject to maritime law. 497 U.S. at 503 (Scalia, White, JJ., concurring).

First, the general type of event -- the ejection of a passenger from a vessel and the subsequent collision of that vessel with the passenger -- is the type of event that can have a potentially disruptive effect on maritime commerce just as surely as the collision of two recreational boats can have such an effect. Such an event at the mouth of the Saint Lawrence Seaway (to use the hypothetical setting suggested by the Court in *Foremost*, 457 U.S. at 675) could wreak havoc not only through the maneuvers of vessels attempting to avoid striking the person in the water (or attempting to avoid striking vessels which in turn were attempting to avoid striking the person in the water), but also through the subsequent emergency rescue and recovery efforts.

Second, the general type of activity involved here -- the operation and navigation of a pleasure boat on navigable waters -- has been specifically found by this Court to have a "substantial relationship to traditional maritime activity." *Foremost*, 457 U.S. at 675, n.5.

In concluding that this case failed to meet the second prong of the *Sisson* test, the Appellate Court apparently found it significant that "the record was devoid of evidence that negligent navigation played a role in the accident." This rationale must fail for at least three reasons. First, *Sisson* explicitly rejected any requirement of navigational error as a prerequisite for the application of maritime law. *See* 497 U.S. at 365-67. Second, product liability claims arising out of maritime accidents are also subject to federal maritime law. *See, e.g., Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084, 1089 (2d Cir. 1993) (federal maritime law governed products liability action against jet ski manufacturer arising from collision between jet ski and motorboat); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764,

768 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990).[3]

Third, the *Sisson* court refused to engage in *any* inquiry into causation. "Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." *Id.* at 365.

In the instant case, the Appellate Court did not have and should not have needed a full accounting of the evidence that might be adduced at trial on the causes of this accident, including what operational errors may have caused Ms. Grace to fall from the boat and/or be struck by it. While the plaintiff in this case did not choose to state a claim against the operator of the boat, such incidents often do give rise to claims that it was the manner in which the boat was operated that led to the ejection of or collision with the decedent. In fact, nothing would preclude OMC from making such a claim in this case. In view of the commitment to uniformity underlying the *Sisson* analysis, it is clearly improper to distinguish between otherwise identical accidents simply on the basis of whether, at the time the issue of the application of maritime law is raised, there happens to be evidence in the record of negligent operation of the boat.

2. The Appellate Court Decision Conflicts with Other State and Federal

[3] Indeed, maritime law has a products liability component precisely to address such claims. *See* 2 BENEDICT ON ADMIRALTY § 216 (1993) (entitled "Products Liability").

Court Decisions in Cases Involving Recreational Boating Accidents.

In stark contrast to the Appellate Court (and, by its silence, the Illinois Supreme Court), a number of state and federal courts have held that claims arising out of a variety of single and multiple-vessel recreational boating accidents should be governed by maritime law. Particularly apposite is *Complaint of Bird*, 794 F. Supp. 575, 580 (D.S.C. 1992), in which the federal district court applied the *Sisson* test and concluded that maritime law applied where a passenger on an anchored recreational boat fell overboard. *See also St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir.) (admiralty law applied in personal injury action where plaintiff was ejected from pleasure boat into the Arkansas River), *cert. denied*, 419 U.S. 884 (1974). Maritime law has also been held applicable to cases involving capsized boats, *Banchi v. Miller*, 388 F. Supp. 645 (E.D. Pa. 1974); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990); collisions between boats and swimmers, *Oliver v. Hardesty*, 745 F.2d 317 (4th Cir. 1984); *Medina v. Perez*, 733 F.2d 170 (1st Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); collisions between a boat and a fixed object or obstruction, *Wilder v. Placid Oil Co.*, 611 F. Supp. 841 (W.D. La. 1985) (citing decisions of the Second, Third, Fourth, Fifth and Eighth Circuits); single boat accidents, *Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022 (4th Cir.), *cert. denied*, 478 U.S. 1004 (1986); collisions between small motorboats and personal watercraft, *Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084 (2d Cir. 1993); and accidents occurring while pleasure boats were tied to a dock, *American Eastern Dev. Corp. v. Everglades Marina*, 608 F.2d 123

(5th Cir. 1979); *In re Colquitt*, 1975 A.M.C. 981 (D. Md. 1975).

Thus, the Appellate Court's attempt to fend off the application of maritime law to this case cannot be reconciled with *Foremost* or *Sisson* or with the state and lower federal court cases that have followed this Court's lead. Furthermore, as the following section describes, in its search for precedent to support its decision, the Appellate Court effectively rewrote the holdings of a line of wholly inapposite cases. In so doing, it announced a rule that, if allowed to stand, would set back by more than a decade this Court's efforts to foster the uniformity of maritime law.

3. In Declaring that Maritime Law Does Not Apply to "Aquatic Recreation Involving a Pleasure Boat," the Appellate Court Improperly Invoked a Fact-Dependent Analysis Embraced by a Line of Cases Which Hold that Where an Anchored Vessel is Simply Being Used as a Floating Platform, Maritime Law May Not be Implicated.

The only precedent relied upon by the Appellate Court in support of its refusal to apply maritime law to this case was a line of cases involving anchored vessels that were being used not as vessels, but rather as platforms for launching other activities. Where injuries have occurred in conjunction with those activities, some courts have held that maritime jurisdiction was not triggered simply because the activities were initiated from boats. This line of cases was the source of the ruling in *Delta Country Ventures v. Magana*, 986 F.2d 1260 (9th Cir. 1993), the primary case upon which the Appellate Court relied.

Magana involved a guest who dived from the deck of a houseboat anchored in navigable waters, struck something under water, and sustained serious injuries. The Ninth Circuit found that the injured houseboat guest was "engaging in the activity of diving when he was injured." 986 F.2d at 1262. Citing the *Sisson* analysis, the court concluded that "aquatic recreation *off* a pleasure boat" was the activity that gave rise to the incident, and accordingly held that admiralty jurisdiction did not apply. *Id.* (emphasis added).

The cases relied upon by *Magana* have also, without exception, involved activities completed "off" of a stationary boat (*e.g.*, injuries resulting from scuba diving or diving), and *all have involved injuries which were in no way caused by the vessel itself. See, e.g., Foster v. Petticord*, 826 F.2d 1370, 1376 (4th Cir. 1987) (claims involving injuries sustained when plaintiff dived off a parked boat did not invoke admiralty jurisdiction because the case really involved activities "in which a pleasure boat was used as a diving platform"), *cert. denied*, 484 U.S. 1027 (1988); *Smith v. Knowles*, 642 F. Supp. 1137, 1140 (D. Md. 1986) (admiralty jurisdiction did not apply to a wrongful death action in which the decedent drowned when he dived overboard to urinate: "The defendant might as well have been estimating the depth of a swimming pool."); *American Nat'l. Bank & Trust Co. of Waukegan v. United States*, 636 F. Supp. 147, 150-51 (N.D. Ill. 1986) (diving from a private boat into a lake was not a traditional maritime activity subject to admiralty jurisdiction, noting that the boat "was not even involved in any manner with the injury suffered").

Whether this line of cases can survive a properly-conducted *Sisson* analysis is doubtful. With their emphasis on factual vagaries such as whether the boat was anchored, whether the injured person dived in voluntarily or fell off by

accident, and whether the precise actions of those involved could alternatively have been launched from a land-based platform, these cases engage in precisely the sort of fact-dependent, subtlety-laden analysis that *Sisson* rejected, the kind of analysis that is a recipe for confusion rather than a template for uniformity. *See Magana*, 986 F.2d at 1264 (Kozinski, J., dissenting); *see also Complaint of Bird*, 794 F. Supp. 575, 579 (D.S.C. 1992) (suggesting *Sisson* may have implicitly limited or overruled these cases because they narrowly define maritime tort jurisdiction for pleasure vessels).

But however problematic their approach, the *Magana* case and its predecessors had up to now never been extended beyond their limited context -- a person injured while engaged in activities off a stationary boat, where the boat itself was not the instrumentality of the injury. The instant case, however, is the mutant offspring of *Magana*. The Appellate Court took the fact-dependent analysis of *Magana* to its most troublesome extremes, and patently rewrote the *Magana* holding. Instead of standing for the very limited, and highly questionable, proposition that activities *off* of a *stationary* boat were not maritime, *Magana* has now been revised by the Appellate Court to declare sweepingly that "aquatic recreation *involving* a pleasure boat" is not maritime. 615 N.E.2d at 88 (App. A5)(emphasis added).

Even if *Magana* can be squared with *Sisson*, neither case can be read to deny the application of federal maritime law to an accident such as this one, where the decedent fell from a moving boat in navigable waters and was struck and killed by the boat itself. On the contrary, both *Foremost* and *Sisson* state that activities, recreational or otherwise, "involving" boats on navigable waters generally *are* subject to admiralty jurisdiction. The analytical struggle of the

Illinois Appellate Court to avoid federal maritime law, and the anomalous holding that resulted, bear witness to the incompatibility of the fact-dependent approach with this Court's commitment to uniformity. It is critical, therefore, that this decision not be allowed to stand as controlling precedent in Illinois, or as a misguiding beacon in other jurisdictions.

C. The Appellate Court's Decision Poses a Threat to Uniformity That is of Substantial Practical Importance.

The ramifications of the Appellate Court decision go far beyond the four corners of this case. The state of Illinois alone, with Lake Michigan and the Mississippi River on its borders and numerous important rivers within,[4] has thousands of miles of navigable waterways used for recreational boating. Statistics kept by the United States Coast Guard on accidents involving recreational boats reveal that during 1992 there were at least 79 reported accidents, including 13 fatal accidents, occurring in waters of joint federal/state jurisdiction in Illinois alone. *Boating Statistics 1992*, U.S. Dep't. of Transp. -- U.S. Coast Guard, at 10 (June 1993).[5] During the period 1988-1992, recreational boating accidents in all Illinois waters totalled over 500, including over 100 fatal accidents. *Id.* at 13. Assuming the geographic distribution of the accidents during that five-year period was roughly the same as in 1992 (*Id.* at 10), the

[4] *See* 92 Illinois Administrative Code, Ch. I, § 704.Appendix A (reproduced in pertinent part at App. A34-A41).

[5] For the Court's reference, this document has been lodged with the Clerk of Court along with this Petition.

overwhelming majority of those accidents occurred in waters of joint federal/state jurisdiction.

For the inevitable litigation in the Illinois courts arising out of these recreational boating accidents in navigable waters, the Appellate Court pronouncement that "aquatic recreation involving a pleasure boat" is not a maritime activity remains controlling precedent. Therefore, unless this Court corrects the Appellate Court's error, the state of Illinois will remain a conspicuous breach in the uniform treatment of maritime cases nationwide.

But the potential effect of the Appellate Court decision is not limited to Illinois. Nationwide, there were at least 3,278 reported recreational boating accidents during 1992 occurring in waters of joint federal/state jurisdiction. *Boating Statistics 1992* at 10. Numerous accidents involved, as did this case, a passenger falling overboard and/or the boat striking a person in the water. *Id.* at 12. Plaintiffs in cases arising out of recreational boating accidents upon navigable waterways have already seized upon the rationale and result of the Appellate Court to challenge the application of maritime law in their cases. See, *e.g.*, Appellant's Motion to Enlarge Time to Supplement Argument and Table of Authorities in the case of *Choat v. Kawasaki Motors Corp.*, No. 1920544 (Ala.), in which a plaintiff, who seeks to reverse the trial court's holding that admiralty jurisdiction was proper, has cited the *Woltering* decision in her pending appeal to the Alabama Supreme Court. (App. A42-A47)

Thus, the Appellate Court decision should be reviewed not only because it is contrary to Supreme Court precedent and in conflict with the decisions of other state and federal courts, but also because it represents a significant

threat to uniformity in the application of maritime law in the state of Illinois and nationwide.

II. MARITIME LAW PRECLUDES RECOVERY OF DAMAGES FOR LOSS OF SOCIETY TO THE NON-DEPENDENT SURVIVORS OF DECEDENT.

Because the Appellate Court erroneously concluded that maritime law did not govern this case, it applied Illinois wrongful death law and held that the non-dependent survivors of Stacey Grace were entitled to claim damages for loss of society. Since maritime law does in fact apply to this case, the issue of what damages are permitted under that body of law must be faced.

This Court has never addressed the specific question of whether non-dependent survivors of a person killed in a maritime accident that is neither subject to the Death on the High Seas Act (DOHSA) or the Jones Act are entitled to recover damages for loss of society when such damages are denied to DOHSA and Jones Act claimants.[6] However, the principles enunciated by this Court in other cases, and the consistent rulings of lower courts that have addressed the specific question presented here, make it clear that the non-dependent survivors of the decedent in this case may not recover damages for loss of society.

[6] The Jones Act, 46 U.S.C. app. § 688 (1988), provides the exclusive remedy for "seamen" against their employers for deaths caused during commercial maritime activity. The Death on the High Seas Act, 46 U.S.C. app. §§ 761-768 (1988), allows recovery for deaths occurring outside state territorial waters. Both statutes are by their terms exclusive remedies, precluding recovery under state wrongful death statutes. Both statutes allow recovery only to dependents of the decedent, and only for their pecuniary losses.

A. Where Maritime Law is Applicable, it Preempts State Common Law and Statutory Remedies.

In *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), this Court sought to render maritime wrongful death law uniform "by creating a general maritime wrongful death action applicable in all waters," thereby removing "the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 402.

Since *Moragne*, the courts have consistently held that maritime law supplants state law in general maritime actions for wrongful death arising in state territorial waters. *See, e.g., Matter of S.S. Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 767-69 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990); *Truehart v. Blandon*, 672 F. Supp. 929, 935-36 (E.D. La. 1987); *Gilmore v. Witschorek*, 411 F. Supp. 491, 494 (E.D. Ill. 1976); *Lipworth v. Kawasaki Motors Corp., U.S.A.*, 592 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App.), *cert. denied*, 113 S. Ct. 465 (1992); *Texaco Refining and Marketing v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex.), *cert. denied*, 112 S. Ct. 301 (1991); *Sanders v. Richmond*, 579 S.W.2d 401, 407-08 (Mo. Ct. App. 1979).

Furthermore, the displacement and preemption of state wrongful death remedies is not limited to those instances where there is direct conflict between state law and maritime law. *See Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084, 1087 (2d Cir. 1993). Once maritime law is found to be applicable, it is exclusive and may not be supplemented by a patchwork of state rights and remedies.

B. Plaintiff May Not Recover Damages for Loss of Society in this Case Because Maritime Law Limits Recovery to Dependents of the Deceased.

The courts which have addressed the measure of damages recoverable in a general maritime wrongful death action have fashioned a logical, uniform approach that furthers the goals of *Moragne* and is consistent with federal maritime statutes. That approach follows the lead of the Jones Act and DOHSA in distinguishing between dependents and non-dependents, allowing recovery to the former but not to the latter.

Thus, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court held that, in view of the Jones Act and DOHSA limitations on recovery to actual pecuniary losses, it could not sanction more expansive remedies for general maritime wrongful death actions brought under *Moragne*. Therefore, non-dependent survivors bringing a general maritime wrongful death action would not be permitted to recover damages for loss of society.

While *Miles* involved the death of a seaman, the lower courts have consistently recognized that any attempt to limit or distinguish the holding on that basis must fail in light of the *Moragne* goal of uniformity in the scope of damages recoverable in a general maritime death claim. Accordingly, those courts have concluded that non-dependents may not recover loss of society damages, regardless of whether the claim arises under *Moragne*, the Jones Act, or DOHSA, and regardless of whether the decedents were seamen or non-seamen. *See, e.g.*, *Wahlstrom*, 4 F.3d at 1090 (denying recovery to non-dependent parents of a minor killed in a jet-

ski accident); *Truehart*, 672 F. Supp. at 935 (denying loss of society damages to non-dependent survivors of a pleasure boat passenger killed in territorial waters); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151, 1152 (S.D. Fla. 1992) (loss of society damages denied to non-dependent survivors of individual who died in a collision between two personal watercraft); *In re Cambria Steamship Co.*, 353 F. Supp. 691, 696 (N.D. Ohio 1973)(non-dependent relatives may not recover), *aff'd sub nom Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir. 1974), *and cert. denied*, 420 U.S. 975 (1975); *Texaco Refining*, 808 S.W.2d at 63-64 (denying recovery for loss of society to survivors of "good samaritan" killed when he stopped to help a boat owner free his propeller); *Lipworth*, 592 So.2d at 1152-53 (denying recovery in product liability action to non-dependent parents of a young girl killed in a jet ski accident).

Thus, application of maritime law to this case preempts state wrongful death remedies. Further, maritime law precludes recovery by non-dependents of damages for loss of society. Therefore, reversal of the Appellate Court's erroneous holding on the application of maritime law mandates reversal of its judgment altogether, and reinstatement of the trial court order granting partial summary judgment to OMC on plaintiff's claims for loss of society damages.

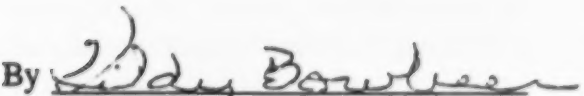
CONCLUSION

For the reasons stated, the Appellate Court's decision is insupportable. It flies in the face of this Court's opinions in *Foremost* and *Sisson*, as well as a host of lower court rulings. To leave the Appellate Court decision intact is to re-open the door to the fact-dependent, highly result-oriented

approach that this Court has rejected, an approach that is fundamentally at odds with the constitutionally mandated "system of [maritime] law coextensive with, and operating uniformly in, the whole country." Accordingly, this Court should grant this Petition for Certiorari.

Respectfully submitted,

BOWMAN AND BROOKE

By 

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January 4, 1994

INDEX TO APPENDIX

Opinion of the Appellate Court of Illinois, Fifth District [615 N.E.2d 86 (Ill. Ct. App. 1993)]. A1

Order of the Illinois Supreme Court Entered October 6, 1993, Denying OMC's Petition for Leave to Appeal. A8

Order of the Circuit Court for Madison County Entered March 31, 1992, Concluding March 20, 1992, Ruling Raises a Question of Law. A9

Order of the Circuit Court for Madison County Entered March 20, 1992, Granting Defendant's Motion for Partial Summary Judgment. A11

Outboard Marine Corporation's Motion for Partial Summary Judgment on Plaintiff's Claims for Damages for Loss of Society. A12

Plaintiff's Complaint. A15

Jones Act, 46 U.S.C. app. § 688 (1988). A30

Death on the High Seas Act, 46 U.S.C. app. §§ 761-67 (1988). A32

92 Illinois Administrative Code, Ch. I, § 704.Appendix A (Public Bodies of Water). A34

Motion to Enlarge Time to Supplement
Argument and Table of Authorities,
Choat v. Kawasaki Motors Corp. (Ala.). A42

No. 5-92-0248

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	Appeal from the Circuit Court of Madison County
Plaintiff-Appellant,	)	No. 90-L-193
v.	)	Honorable A.A. Matoesian, Judge Presiding.
OUTBOARD MARINE CORPORATION,	)	
Defendant-Appellee.	)	

JUSTICE MAAG delivered the opinion of the court:

The plaintiff, David R. Woltering, administrator of the estate of Stacey Lee Grace, deceased, petitioned this court pursuant to Illinois Supreme Court Rule 308 for leave to appeal an order of the circuit court of Madison County granting partial summary judgment to the defendant, Outboard Marine Corporation. We granted the plaintiff's petition for leave to appeal.

This case arises out of an accident which occurred on April 27, 1989. The complaint alleges that Stacey Lee Grace was a passenger on a pleasure craft being operated on the Mississippi River near St. Charles County, Missouri. She was thrown from the boat and apparently struck by the propeller of the outboard motor. This outboard motor was manufactured by the defendant, Outboard Marine Corporation. At the time of her death, Stacey Lee Grace was unmarried and left no surviving children. The next of kin claiming an interest in this litigation are her father and her sister.

Prior to her death, Stacey Lee Grace lived in an apartment in the basement of her parent's home and paid them $100 per month in rent. Neither her father nor sister were financially dependent upon the decedent. They have, however, claimed damages due to their loss of companionship, guidance, advice, love, and affection for the decedent.

We are confronted with two issues in this case. First, we must decide whether Federal admiralty law or State substantive law applies. Second, regardless of whether Federal admiralty law applies or State law applies, we must determine the correct measure of damages given the facts of this case.

A trilogy of United States Supreme Court cases provide guidance in determining whether this case as pleaded arises under Federal admiralty law or under State products liability law. The United States Supreme Court in Executive Jet Aviation, Inc. v. City of Cleveland (1972), 409 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493, established a two-part test for determining whether a case falls within the admiralty law jurisdiction. The supreme court held that it first must be

ascertained whether the tortious wrong occurred on navigable waters. If, in fact, the alleged wrong occurred on navigable waters, then the court must determine whether there is a significant relationship between the wrong and traditional maritime activity.

In Foremost Insurance Co. v. Richardson (1982), 457 U.S. 668, 73 L.Ed.2d 300, 102 S.Ct. 2654, the Supreme Court reiterated the previously stated rule. It emphasized that admiralty jurisdiction is limited by the requirement that the wrong must bear a significant relationship to traditional maritime activity. The court held that the collision of two pleasure boats on navigable waters because of negligent operation did constitute a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction. The Supreme Court recognized that, although the primary focus of admiralty jurisdiction is the protection of maritime commerce, all vessel operators must be subject to uniform rules of conduct on navigable waters. To ignore this fact would ignore the potential impact of noncommercial maritime activity on maritime commerce. Richardson, 457 U.S. at 674-75, 73 L.Ed.2d 300, 102 S.Ct. 2654.

The final case in the trilogy is Sisson v. Ruby (1990), 497 U.S. 358, 111 L.Ed.2d 292, 110 S.Ct. 2892. In Sisson, a fire broke out aboard a yacht docked at a marina. The yacht was destroyed along with several neighboring vessels and the marina. The fire itself apparently started in the area of a washer/dryer unit. The Supreme Court was confronted with the question of whether Federal admiralty jurisdiction could be invoked under those facts. The court found that admiralty jurisdiction was present despite the fact that no commercial vessels were involved. The court reasoned that a fire has a "potentially disruptive impact on maritime commerce" because of the potential of it spreading to

commercial vessels and because the damage to the marina could make it inaccessible to commercial vessels. (Sisson, 497 U.S. at 363, 111 L.Ed.2d 292, 110 S.Ct. 2892.) Therefore, the court held that since both the locality test, that is, an alleged wrong occurring on navigable waters, and the nexus test, a substantial relationship to traditional maritime activities, were satisfied, Federal admiralty jurisdiction was proper.

We must now apply these rules to the facts of this case. We have considered the authorities cited by the parties and conclude that Federal admiralty law does not apply in this case.

We do not reach this conclusion because of the absence of an allegation of negligent navigation. As the defendant correctly points out, a claim of improper navigation is only one factor to consider in determining whether admiralty jurisdiction is present. Sisson is an excellent example of a case where there is no allegation of improper navigation and yet admiralty jurisdiction was found to exist.

Rather, we reach the conclusion that this case does not fall within the admiralty jurisdiction because there is an insufficient relationship to traditional maritime activity. In Delta Country Ventures, Inc. v. Magana (9th Cir. 1993), 986 F.2d 1260, the plaintiff dove from the deck of a houseboat and struck something underwater, sustaining serious injuries. The boat had been leased for recreational use, and the plaintiff was on the boat as a guest. One of the issues in the case was whether the admiralty jurisdiction of the court was implicated. The United States Court of Appeals for the Ninth Circuit stated:

> "In Sisson, the Supreme Court stated that 'protecting commercial shipping is at the heart of admiralty jurisdiction' and '[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction.' [Citation.] The Court then set forth a two-step inquiry for determining whether jurisdiction exists: First, we 'assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.' [Citation.] Second, we ask whether the party seeking to invoke maritime jurisdiction has shown 'a substantial relationship between the activity giving rise to the incident and traditional maritime activity.'" 986 F.2d at 1262.

Applying this test, the court in Magana defined the relevant activity as "aquatic recreation off a pleasure boat ***." The court concluded that "aquatic recreation off a pleasure boat" was not sufficiently related to traditional maritime activity to support admiralty jurisdiction.

Similarly, in the instant case we must define the activity taking place at the time of the injury, and we hold that the relevant activity giving rise to the incident was aquatic recreation involving a pleasure boat.

A decision closely paralleling the facts of this case is Kunreuther v. Outboard Marine Corp. (E.D.Pa. 1989), 715 F.Supp. 1304. In the Kunreuther case, plaintiff's decedent was snorkeling in Jamaican waters when she was struck by a propeller from an Evinrude outboard motor. The plaintiff alleged that the outboard motor should have been equipped

with a propeller guard. The identical allegation is made by the plaintiff in this case. The United States district court, after analyzing the law of admiralty jurisdiction, concluded that under the facts of that case admiralty jurisdiction did not lie.

The Federal district court later withdrew this decision and concluded that the Death on the High Seas Act (Act)(46 U.S.C.A. § 761 et seq. (West 1975 & Supp. 1993) must be applied. However, the court did not retreat from its prior ruling that in the absence of the Act Federal admiralty law should not apply. (Kunreuther v. Outboard Marine Corp. (E.D.Pa. 1991), 757 F.Supp. 633.) In this case, there is no claim that the Act is involved.

We reach the same conclusion as the courts in Magana and Kunreuther. Admiralty law does not apply in this case. Rather, Illinois law applies. We reach this conclusion because only the locality test has been met. The second prong of the two-part jurisdictional test, a significant relationship to traditional maritime activity, has not been satisfied. Magana, 986 F.2d at 1262.

The defendant has cited several cases that at first blush seem to conflict with Magana and Kunreuther. However, nearly all of the authorities cited involved a collision between vessels or some other form of negligent navigation. While negligent navigation is not necessary to invoke admiralty jurisdiction, its presence strongly suggests the propriety of applying admiralty law. (Foremost, 457 U.S. at 675 n.5, 73 L.Ed.2d at 306 n.5., 102 S.Ct. at 2658 n.5.) In this case, the record is devoid of any evidence that negligent navigation played a role in the accident.

Given the fact that we have concluded that Illinois law applies to this case, we must now determine whether loss of society damages are recoverable. It is clear that loss of society damages for the death of an adult child are recoverable. (See Ballweg v. City of Springfield (1986), 114 Ill.2d 107, 120, 499 N.E.2d 1373.) The Illinois Supreme Court has stated that Illinois law recognizes that pecuniary losses encompass loss-of-society damages for many facets of family relationships. (Seef v. Sutkus (1991), 145 Ill.2d 336, 338, 583 N.E.2d 510, 511.) Recently, the Illinois Supreme Court recognized that a proven loss of sibling's society is a pecuniary injury for which siblings can recover under the wrongful death statute. (In re Estate of Finley (1992), 151 Ill.2d 95, 103, 601 N.E.2d 699, 702.) Therefore, siblings may recover for loss of society of a deceased brother or sister, but such damages must be proven. (Finley, 151 Ill.2d at 106, 601 N.E.2d at 699.) We find that loss-of-society damages are recoverable in this case.

Accordingly, the partial summary judgment entered by the circuit court of Madison County is hereby reversed, and the cause is remanded for further proceedings consistent with this decision.

Reversed and remanded.

GOLDENHERSH, J., and W. A. LEWIS, J., concur.

ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
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October 6, 1993

Mr. William A. Schmitt
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No. 75831 - David R. Woltering, Adm'r., etc., respondent, v. Outboard Marine Corporation, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIES the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1993.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	
Plaintiff,	)	Case No. 90-L-193
v.	)	
OUTBOARD MARINE CORPORATION,	)	
Defendant.	)	

ORDER

Pursuant to Supreme Court Rule 308, the Court hereby finds that the Order of March 20, 1992, granting Defendant's Motion for Partial Summary Judgment involves a question as to which there is substantial grounds for difference of opinion and that immediate appeal may materially advance the ultimate termination of the litigation. The question of law involved is whether Federal Admiralty Law governs and, if so, does general Maritime Law preclude

recovery for loss of society damages in a wrongful death action based on products liability.

/s/ A.A. Matoesian
Honorable A.A. Matoesian
Circuit Judge

ENTERED: 03/31/92

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Woltering — No. 90-L-193

Plaintiff

Div.

vs.

Outboard Marine Corporation

ORDER

Upon motion of defendant, OMC, for partial summary judgment on plaintiff's claims for damages for loss of society, and the Court, having heard arguments of counsel, considered the motion, and matters filed in support of and opposition hereto, finds that said motion should be and is hereby allowed.

It is therefore Ordered that summary judgment is Granted in favor of defendant on Counts I and III of plaintiff's Complaint seeking damages for "companionship, guidance, advice, love and affection."

Date: 03/20/92

/s/ A.A. Matoesian
Honorable A.A. Matoesian
Circuit Judge

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	
Plaintiff,	)	Case No. 90-L-193
v.	)	
OUTBOARD MARINE CORPORATION,	)	
Defendant.	)	

MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS FOR DAMAGES FOR LOSS OF SOCIETY

Defendant, Outboard Marine Corporation ("OMC"), pursuant to Ill.Rev.Stat., ch. 110, § 2-1005(d), moves the Court for Summary Judgment on Counts I and III of plaintiff's Complaint, to the extent plaintiff alleges, and seeks to recover non-pecuniary losses as damages in this lawsuit, UPON THE GROUNDS THAT:

1. Plaintiff has filed a multi-Count Complaint against OMC, alleging that plaintiff's decedent was a passenger in a boat being operated on the Mississippi River on April 27, 1989, when she was thrown from the boat and sustained injuries resulting in her death.

2. Counts I and III of the Complaint are brought by David Woltering as Administrator of decedent's estate, and seek damages for wrongful death, including the loss of "companionship, guidance, advice, love and affection of the decedent."

3. However, as a matter of law, there is no right of recovery for damages for such loss of society under general maritime law in actions for wrongful death.

4. In support of this motion, defendant submits herewith:

(A) True and correct copies of plaintiff's responses to OMC's Interrogatories nos. 2 and 26 (marked as Defendant's Exhibit #1, 10/18/91).

(B) True and correct copies of pertinent pages of the sworn depositions of David Woltering and Sheila Martin, taken October 18, 1991.

(C) Memorandum in Support of this Motion for Partial Summary Judgment on Plaintiff's Claims for Damages for Loss of Society.

WHEREFORE, defendant, Outboard Marine Corporation, respectfully submits that there is no genuine issue of material fact, and that it is entitled to judgment, as a matter of law, on Counts I and III of plaintiff's Complaint, to the extent plaintiff seeks damages for the loss of decedent's companionship, guidance, advice, love and affection.

THOMPSON & MITCHELL

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IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	
Plaintiff,	)	Case No. 90-L-193
v.	)	
OUTBOARD MARINE CORPORATION,	)	
Defendant.	)	

COMPLAINT

COUNT I

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased, by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff brings this action as such Administrator pursuant to, and as authorized, by the Illinois Wrongful Death Act, Chapter 70, Paragraphs 1 and 2, of the Illinois Revised Statutes, on behalf of and for the benefit of her parents and next of kin of the decedent.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. The Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, involved in this suit was in a defective, and hence unreasonably dangerous, condition on the date of the occurrence made the basis of this suit, in that it lacked a propeller guard or shroud.

10. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, was the proximate cause of the injuries to plaintiff's decedent and her subsequent death.

11. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, existed at the time that the product left the defendant's control.

12. Plaintiff's decedent left as survivors: her father, David R. Woltering; her mother, Doris M. Woltering; and her sister, Sheila Martin.

13. By reason of the death of the decedent, the aforementioned heirs and next of kin of the decedent have, and each of them has, been deprived of large sums of money and valuable services which decedent was accustomed to contribute and perform, and which she would have continued to perform in the future but for her death. The aforementioned heirs and next of kin of decedent have also been deprived of the companionship, guidance, advice, love and affection of the decedent.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

BY: /s/ Robert H. Gregory
ROBERT H. GREGORY
#03122358
Cox & Gregory
205 W. Main Street
East Alton, IL 62024
(618) 259-4551

/s/ Barbara S. Joiner
BARBARA S. JOINER
#03123225
2 Center Grove Road
Edwardsville, IL 62025
(618) 692-0406

COUNT II

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,

by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff, as Administrator of the estate of Stacey Lee Grace, brings this action to recover damages resulting from injuries to the person and property of the decedent pursuant to the common law and pursuant to the Illinois Survival Statute, Chapter 110-1/2, Paragraph 27-6 of the Illinois Revised Statutes.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. The Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, involved in this suit was in a defective, and hence unreasonably dangerous, condition on the date of the occurrence made the basis of this suit, in that it lacked a propeller guard or shroud.

10. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, was the proximate cause of the injuries to plaintiff's decedent and her subsequent death.

11. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, existed at the time that the product left the defendant's control.

12. As a direct and proximate result of the unreasonably dangerous condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, decedent suffered severe lacerations to her right upper chest, abdomen, and right hip, for which she was hospitalized and placed under trauma unit medical care until she died as a result of her injuries. Until her death, decedent suffered great physical pain and mental anguish. Decedent further incurred substantial hospital, medical, nursing, and funeral expenses by reason of her injuries and resulting death.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

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COUNT III

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased, by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff brings this action as such Administrator pursuant to, and as authorized, by the Illinois Wrongful Death Act, Chapter 70, Paragraphs 1 and 2, of the Illinois Revised Statutes, on behalf of and for the benefit of her parents and next of kin of the decedent.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. Defendant, Outboard Marine Corporation, negligently manufactured, designed, assembled, sold, furnished or supplied the Evinrude outboard boat motor involved in this suit in one or more of the following respects:

(a) Negligently manufactured the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(b) Negligently designed the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(c) Negligently sold and distributed to the general public an outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(d) Negligently failed to warn decedent and others of the dangers of unguarded outboard boat motor propellers.

10. That one or more of the foregoing negligent acts or omissions of defendant, Outboard Marine Corporation, was the proximate cause of the injuries to the decedent and her resulting death.

11. Plaintiff's decedent left as survivors: her father, David R. Woltering; her mother, Doris M. Woltering; and her sister, Sheila Martin.

12. By reason of the death of the decedent, the aforementioned heirs and next of kin of the decedent have, and each of them has, been deprived of large sums of money and valuable services which decedent was accustomed to contribute and perform, and which she would have continued

to perform in the future but for her death. The aforementioned heirs and next of kin of decedent have also been deprived of the companionship, guidance, advice, love and affection of the decedent.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

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/s/ Barbara S. Joiner
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COUNT IV

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased, by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff, as Administrator of the estate of Stacey Lee Grace, brings this action to recover damages resulting from injuries to the person and property of the decedent pursuant to the common law and pursuant to the Illinois Survival Statute, Chapter 110-1/2, Paragraph 27-6 of the Illinois Revised Statutes.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. Defendant, Outboard Marine Corporation, negligently manufactured, designed, assembled, sold, furnished or supplied the Evinrude outboard boat motor involved in this suit in one or more of the following respects:

(a) Negligently manufactured the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(b) Negligently designed the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(c) Negligently sold and distributed to the general public an outboard boat motor

without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(d) Negligently failed to warn decedent and others of the dangers of unguarded outboard boat motor propellers.

10. That one or more of the foregoing negligent acts or omissions of defendant, Outboard Marine Corporation, was the proximate cause of the injuries to the decedent and her resulting death.

11. As a direct and proximate result of the negligent acts or omissions of defendant, Outboard Marine Corporation, as hereinabove alleged, decedent suffered severe lacerations to her right upper chest, abdomen, and right hip, for which she was hospitalized and placed under trauma unit medical care until she died as a result of her injuries. Until her death, decedent suffered great physical pain and mental anguish. Decedent further incurred substantial hospital, medical, nursing, and funeral expenses by reason of her injuries and resulting death.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

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JONES ACT
46 U.S.C. app. § 688 (1988)

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred -- (A) while that person was in the employ of an enterprise engaged in the exploration, development, or

production of off-shore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person -- (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

DEATH ON THE HIGH SEAS ACT
46 U.S.C. app. §§ 761-67 (1988)

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die [sic] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

§ 704.Appendix A Public Bodies of Water

The following public bodies of water were navigable in their natural condition or were improved for navigation and opened to public use. The entire length and surface area in Illinois, including all backwater lakes and sloughs open to the main channel or body of water at normal flows or stages, are open to the public unless limited to a head of navigation as stated. Head of navigation descriptions use the U.S. rectangular survey system and these abbreviations: T = township, R = range, PM = principle meridian, Sec. = section, 1/4 = quarter section, N = north, E = east, S = south, W = west, USGS = U.S. Geological Survey.

1) Lake Michigan;

2) Chicago River: Main Branch;

3) Chicago River: North Branch to North Shore Channel;

4) Chicago River: South Branch;

5) Chicago River: South Fork of South Branch;

6) Chicago River: East and West Arms of South Fork of South Branch;

7) Chicago River: West Fork of South Branch to Chicago Sanitary and Ship Canal;

8) Calumet River;

9) Lake Calumet and entrance channel to Calumet River;

10) Grand Calumet River;

11) Little Calumet River;

12) Wolf Lake (Cook County);

13) Mississippi River (including all backwater lakes such as Frentress Lake in Jo Daviess County, Boston Bay in Mercer County and Quincy Bay in Adams County);

14) Sinsiniwa River to North Line of Sec. 9, T28N, R1W, 4th PM in Jo Daviess County, which is located approximately two-thirds mile downstream from the U.S. Highway 20 bridge. This area is shown on the Galena, Ill.-Iowa, 7.5 minute USGS quadrangle map;

15) Galena River to East Line of Sec. 6, T28N, R1E, 4th PM in Jo Daviess County, which is located approximately one-half mile upstream from the County Highway 67 bridge.

This area is shown on the Galena, Ill.-Iowa, 7.5 minute USGS quadrangle map;

16) Apple River to North Line of Sec. 35, T26N, R2E, 4th PM in Jo Daviess County;

17) Plum River to North Line, T24N, R3E, 4th PM in Carroll County, which is located approximately one and one-half miles upstream from the U.S. Highway 52 bridge. This area is shown on the Savanna, Ill., 15 minute USGS quadrangle map;

18) Rock River;

19) Pecatonica River;

20) Sugar River (Winnebago County);

21) Stillman Creek to South Line, T25N, R11E, 4th PM in Ogle County, which is located approximately one-third mile downstream from the Illinois Highway 72 bridge. This area is shown on the Stillman Valley, 7.5 minute USGS quadrangle map;

22) Henderson Creek (new channel) to East Line, SW 1/4, Sec. 6, T10N, R5W, 4th PM in Henderson County. The river has been relocated and the old channel abandoned.

23) The Sny in Adams, Pike and Calhoun Counties. The area has been drained with levees and ditches and it is uncertain that any descendent body of water exists;

24) Bay Creek to West Line, Sec. 29, T8S, R3W, 4th PM in Calhoun County. The head of navigation is the limit of meanders on the official plat of survey; but it is uncertain that any descendent body of water exists;

25) Illinois River (including all backwater lakes such as Peoria Lake in Peoria, Tazewell and Woodford Counties; Matanzas Bay in Mason County; and Meredosia Lake in Cass and Morgan Counties);

26) Des Plaines River to Hoffman Dam in Cook County, which is located one-half mile downstream from the junction with Salt Creek. This area is shown on the Berwyn, 7.5 minute USGS quadrangle map;

27) Kankakee River;

28) Iroquois River to South Line, SW 1/4, Sec. 30, T27N, R12W, 2nd PM in Iroquois County, which is located approximately one mile downstream from the junction with Sugar Creek.

This area is shown on the Gilman, 15 minute USGS quadrangle.

29) Fox River (Illinois River Basin);

30) Griswold Lake (McHenry County);

31) Fox Chain-O-Lakes (Lake and McHenry Counties): Bluff Lake, Lake Catherine, Channel Lake, Fox Lake, Grass Lake, Lake Marie, Nippersink Lake, Dunns Lake, Pistakee Lake, Lake Jerilyn, Lac Louette, Redhead Lake;

32) Vermilion River (Illinois River Basin) to approximately one-half mile above the mouth near Oglesby in LaSalle County;

33) Spring Lake (Tazewell County);

34) Spoon River to North Line, Sec. 24, T6N, R1E, 4th PM in Fulton County, which is located approximately one-half mile upstream from the Illinois Highway 95 bridge. This area is shown on the Smithfield, 7.5 minute USGS quadrangle map;

35) Sangamon River to South Line, NE 1/4, Sec. 1, T15N, R4W, 3rd PM in Sangamon County, which is located approximately one mile south of the Mechanicsburg Road bridge. This

area is shown on the Mechanicsburg, 7.5 minute USGS quadrangle map;

36) Sangamon River: South Fork to South Line, Sec. 33, T16N, R4W, 3rd PM in Sangamon County, which is located approximately two miles upstream from the mouth. This area is shown on the Springfield-East, 7.5 minute USGS quadrangle map;

37) Macoupin Creek to East Line, Sec. 25, T9N, 413W, 3rd PM in Green and Jersey Counties, which is located approximately one mile downstream from the junction with Boyer Creek. This area is shown on the Boyer Creek, 7.5 minute USGS quadrangle map;

38) Otter Creek to East Line of Sec. 3, T7N, R13W, 3rd PM in Jersey County, which is located approximately two miles east of the Illinois Highway 100 bridge. This area is shown on the Nutwood, 7.5 minute USGS quadrangle map;

39) Kaskaskia River to East Line, SW 1/4, Sec. 31, T8N, R2E, 3rd PM, which is located nine miles south and two miles west of Herrick. This area is shown on the Vera, 7.5 minute USGS quadrangle map;

40) Big Muddy River to East Line T8S, R2W, 3rd PM in Jackson County, which is located approximately one mile northwest of the Southern Illinois Airport. This area is shown on the Murphysboro, 7.5 minute USGS quadrangle map;

41) Ohio River;

42) Wabash River;

43) Vermilion River (Wabash River Basin) to West Line, T19N, R11W, 2nd PM in Vermilion County, which is located approximately one mile upstream from the junction with the North Fork. This area is shown on the Danville, SW, 7.5 minute USGS quadrangle map;

44) Little Wabash River to the Illinois Highway 1 bridge in Carmi in White County;

45) Saline River to junction of North Ford and South Fork;

46) Saline River: North Fork to North Line, Sec. 5, T8S, R8E, 3rd PM in Gallatin County, which is located approximately three miles south of the junction of Illinois Highway 141 and U.S. Highway 45. This area is shown

on the Ridgway, 7.5 minute USGS quadrangle map;

47) Saline River: South Fork to West Line, T9S, R8E, 3rd PM in Gallatin County, which is located at the Gallatin-Saline County line. This area is shown on the Equality, 7.5 minute USGS quadrangle map;

48) Horseshoe Lake (Alexander County).

IN THE SUPREME COURT OF ALABAMA

1920544

THOMASINE CHOAT APPELLANT

V.

KAWASAKI MOTORS CORPORATION;
KAWASAKI HEAVY INDUSTRIES, LTD.;
KAWASAKI MOTORS MANUFACTURING
CORPORATION, APPELLEES

APPEAL FROM THE CIRCUIT COURT OF COLBERT COUNTY, ALABAMA

APPELLANT'S MOTION TO ENLARGE TIME TO SUPPLEMENT ARGUMENT AND TABLE OF AUTHORITIES

Comes now the appellant, Thomasine Choat, and pursuant to Ala. R. App. P. 26(b), moves this Honorable Court to permit appellant to supplement her argument and table of authorities to include Woltering v. Outboard Marine Corp., No. 5-92-0248 (Ill. App. Ct., June 16, 1993), a copy of which is attached hereto as Exhibit A, and the Supplemental Argument of Appellant, attached hereto as Exhibit B. In support of this motion, appellant states:

(1) that Woltering is directly relevant to appellant's argument regarding the lack of admiralty jurisdiction in the present case;

(2) that Woltering was decided after the conclusion of the briefing schedule in the present case;

(3) that Woltering came to appellant's attention only in the past week; and

(4) that appellant obtained a copy of Woltering and prepared this motion as soon as possible after learning of the existence of said opinion.

WHEREFORE, appellant moves this Honorable Court to permit the supplementation of appellant's argument and table of authorities with documents attached hereto as Exhibits A and B.

/s/ R. Ben Hogan
R. BEN HOGAN, III
ATTORNEY FOR APPELLANT

OF COUNSEL:

HOGAN, SMITH, ALSPAUGH,
SAMPLES & PRATT, P.C.
2323 Second Avenue North
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Telephone: (205) 324-5635

EXHIBIT A

Exhibit A is the opinion of the Illinois Appellate Court, Fifth District. The opinion is located at App. A1-A7, *supra*, so it has not been reproduced here.

EXHIBIT B

SUPPLEMENTAL ARGUMENT OF APPELLANT
CHOAT V. KAWASAKI MOTORS CORP., ET AL.,
No. 1920544

In the present case, the appellant's decedent was floating on an inflatable raft when she was struck by a jet ski designed, manufactured, marketed, and sold by appellees. Appellant has previously argued that the trial court erred in holding that admiralty jurisdiction was proper in this case because, among other things, there was no showing that the wrong alleged bore a significant relationship to traditional maritime activity. See Brief for Appellant at 14-17; Reply Brief for Appellant at 7-11.

The Appellate Court of Illinois, Fifth District, recently decided a similar case in which a passenger of a boat was killed when she was thrown from the boat and struck by the boat's propeller. Woltering v. Outboard Marine Corp., No. 5-92-0248 (Ill. App. Ct., June 16, 1993). In Woltering the plaintiffs claimed that the boat motor propeller that struck the plaintiffs' decent was defective and unreasonably dangerous because it was not equipped with a propeller guard. The defendant product manufacturer argued, as appellees do in the present case, that admiralty jurisdiction was proper and that under maritime law, plaintiffs could not recover because they were not dependent upon the decedent. The Illinois court determined that where "the relevant activity giving rise to the incident was aquatic recreation involving a pleasure boat," there was no significant relationship to traditional maritime activity, and admiralty jurisdiction was improper. Woltering, slip op. at 4-5.

As in Woltering, the present case involves aquatic recreation and a claim that is based on the unreasonably dangerous nature of the defective design of the product that struck appellant's decedent. Furthermore, the present case, like Woltering, does not involve negligent navigation. In other words, the activity involved in the present case does not bear a significant relationship to traditional maritime activity. Therefore, admiralty jurisdiction was improperly invoked by the trial court. Appellant urges this Court to reverse the judgment of the trial court and to remand this case for trial on the merits applying the wrongful death law of the State of Alabama.

Respectfully submitted,

/s/ R. Ben Hogan
R. BEN HOGAN, III

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT'S MOTION TO ENLARGE TIME TO SUPPLEMENT ARGUMENT AND TABLE OF AUTHORITIES has been served on the following attorneys by placing same in the United States mail, properly addressed and postage prepaid, this 7 day of Sept, 1993:

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STARNES & ATCHISON
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Florence, Alabama 35631

/s/ R. Ben Hogan
Of Counsel

MOTION FILED
FEB 3 1994

No. 93-1098

In the
Supreme Court of the United States
October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

Richard A. Mueller
Counsel of Record
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QUESTIONS PRESENTED FOR REVIEW

I. Whether The Fatal Injury Of A Passenger On A Recreational Boat Being Operated On Navigable Waters When She Was Thrown Or Fell Overboard And Came Into Contact With The Propeller Of The Boat's Outboard Motor Bears A Substantial Relationship To Traditional Maritime Activity In Order To Bring It Within Maritime Law?

II. Whether Decedent's Nondependent Parent And Sibling May Recover Loss Of Society Damages Under Maritime Law?

No. 93-1098

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

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Administrator of the Estate
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

Applicant, the National Marine Manufacturer's Association ("NMMA"), moves the Court for permission to file an amicus curiae brief in support of Outboard Marine Corporation's Petition for a Writ of Certiorari. Petitioner

Outboard Marine Corporation ("OMC") has given consent, but respondent has not, and leave to file must be sought pursuant to Supreme Court Rule 37.2.

NATURE OF NMMA'S INTEREST

This case involves the question of the scope of maritime law and its application to the facts presented herein. This Court has long held that this body of law must be applied uniformly to all vessels operated on navigable waters in order to protect maritime activities and to provide predictability both with regard to the events which give rise to liability and in the relief available. The Illinois Appellate Court deviated from the principle of uniformity when it held that recreational boating was not covered by maritime law.

The NMMA has a very strong interest in the disposition of the issues concerning maritime law presented in this case. The NMMA is an international, not-for-profit association of marine product manufacturers who design, produce, and distribute recreational boats, engines, parts, and equipment. The NMMA, including its predecessor organizations, was founded in 1906. Today, the NMMA has approximately 1500 members. NMMA members produce approximately eighty percent of the marine products used by recreational boaters and fishermen in the United States.

The fundamental mission of the NMMA is to promote and to encourage recreational boating and the recreational boating industry. The NMMA offers its members and the recreational boating industry a broad spectrum of programs and services including technical services and advice, statistical analyses, participation in and support of trade shows, promotion and advertising, improvements in and advocacy of safety, and assistance in the exportation of the products and services of its members. Also, in furtherance of its mission, the NMMA is and has been involved in lawsuits as both a party and as

amicus curiae and in other activities concerning governmental relations.

The members of the NMMA manufacture and sell recreational boats subject to the Federal Boat Safety Act, 46 U.S.C. § 4301 (Supp. 1993). Their products must also be designed in accordance with the United States Coast Guard regulations promulgated under the Act. The NMMA coordinates a certification program that assures consumers that all boats and associated equipment, which satisfy the NMMA certification requirements, meet mandatory United States Coast Guard regulations as well as voluntary safety and engineering standards (such as the standards promulgated by the American Boat and Yacht Council). The NMMA considers uniformity in maritime law vitally important, particularly in areas of boat design and rules of conduct for boat operators.

The inconsistency of the Illinois Appellate Court decision with prior decisions of this Court threatens the predictability achieved by this Court in maritime law, which includes recreational boating activities. Recreational boating constitutes a large industry involving an extensive number of participants, boats, and locations. The recreational boating industry employs nearly 400,000 people in the United States, with annual sales in excess of 11 billion dollars. The industry presently includes over 20 million recreational boats in the United States. Because the important issues of maritime law involved in this case may substantially affect the uniformity of that body of law and thereby seriously impact the recreational boating industry, the NMMA seeks to file a brief in support of OMC's Petition for a Writ of Certiorari.

NMMA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

The NMMA's perspective, arising from its interest in uniformity and predictability of federal maritime law, necessarily differs from those of the parties to this particular action who are specifically interested in the outcome of this case. The NMMA respectfully encourages this Court to grant OMC's Petition for a Writ of Certiorari and the NMMA's Motion for Leave to Appear as Amicus Curiae (1) to clarify the continuing uncertainty that exists regarding the application of maritime law to recreational boating; (2) to insure uniformity by simplifying the application of maritime law in these cases by ruling that recreational boating is maritime commerce, and (3) to resolve a conflict among the lower courts regarding the application of maritime law when a passenger in the water sustains injuries. The NMMA can effectively and objectively explain the need for a decision by this Court that fosters national uniformity and stability on the issues presented.

Respectfully submitted,

COBURN & CROFT

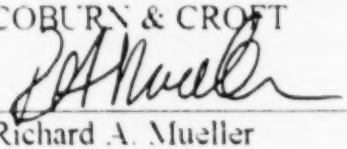
By: 

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI ii

NATURE OF NMMA'S INTEREST iii

NMMA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES v

TABLE OF AUTHORITIES viii

BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI 1

NATURE OF NMMA'S INTEREST 1

INTRODUCTION 2

STATEMENT OF THE CASE 2

ARGUMENT 2

I. The Illinois Appellate Court Erroneously Ruled That The Fatal Injury Of A Passenger On A Recreational Boat Being Operated On Navigable Waters When She Was Thrown Or Fell Overboard And Came Into Contact With The Propeller Of The Boat's Outboard Motor Did Not Bear A Substantial Relationship To Traditional Maritime Activity And Thereby Unjustifiably Refused To Apply Maritime Law 2

A. Uniform Definition of Maritime Law 3

B. Application of Maritime Law 7

C. Recreational Boating Constitutes a Commercial Maritime Activity 9

D. Maritime Law Applies to the Present Case 13

II. The Illinois Appellate Court Erroneously Reversed The Trial Court's Finding That Decedent's Nondependent Parent And Sibling Could Not Recover Loss Of Society Damages Under Maritime Law 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases -- U.S. Supreme Court

East River S.S. Corp. v. Transamerica Delaval, Inc.,
476 U.S. 858 (1986) 8

Executive Jet Aviation, Inc. v. City of Cleveland,
409 U.S. 249 (1972) 3, 4

Foremost Insurance Co. v. Richardson,
457 U.S. 668 (1982) 3, 4, 7, 9, 11, 13, 14, 16

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 17

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 9, 16, 17

Sisson v. Ruby,
497 U.S. 358 (1990) 5-14, 16, 17

The Plymouth, 70 U.S. (3 Wall.) 20 (1866) 3

Cases -- Other Courts

Anderson v. Whittaker Corp.,
692 F. Supp. 764 (W.D. Mich. 1988),
aff'd in part, rev'd in part on other grounds,
894 F.2d 804 (6th Cir. 1990) 8, 9, 16

Coats v. Penrod Drilling Corp.,
5 F.3d 877 (5th Cir. 1993) 14

Complaint of Bird,
794 F. Supp. 575 (D.S.C. 1992) 7, 13, 14

Delta County Ventures, Inc. v. Magana,
986 F.2d 1260 (9th Cir. 1993) 10, 14

Elliott v. Brunswick Corp.,
903 F.2d 1505 (11th Cir. 1990),
cert. denied, 498 U.S. 1048 (1991) 15

Great Lakes Dredge & Dock Co. v. City of Chicago,
3 F.3d 225 (7th Cir. 1993) 9

Kunreuther v. Outboard Marine Corp.,
715 F. Supp. 1304 (E.D. Pa. 1989) 14, 15

Lipworth v. Kawasaki Motors Corp., U.S.A.,
592 So.2d 1151 (Fla. App. 1992) 17

Mowery v. Mercury Marine,
773 F. Supp. 1012 (N.D. Ohio 1991) 15

Sieracki v. Seas Shipping Co.,
149 F.2d 98 (3d Cir. 1945),
aff'd, 328 U.S. 85 (1946) 8

Souther v. Thompson, 754 F.2d 151 (4th Cir. 1985) 4

Truehart v. Blandon,
672 F. Supp. 929 (E.D. La. 1991) 16

Wahlstrom v. Kawasaki Heavy Industries,
4 F.3d 1084 (2d Cir. 1993) 9, 15, 17

Woltering v. OMC,
615 N.E.2d 86 (Ill. App. 1993) 15

Statutes/Regulations

28 U.S.C. § 1333 (1993) 15

33 U.S.C. § 2001 (1986 and Supp. 1993) 11

46 U.S.C. § 688 (1988) 16

46 U.S.C. § 761 (1988) 16

46 U.S.C. § 4301 (Supp. 1993) 11, 15

46 U.S.C. § 13110 (Supp. 1993) 11

Secondary Authorities

American Red Cross National Boating Survey (1991) 10

National Transportation Safety Board,
Recreational Boating Safety Study (1993) 11

NMMA, Boating 1993 (1993) 10

U.S. Dep't of Transp., U.S. Coast Guard,
Boating Statistics 1989 (1989) 12

U.S. Dep't of Transp., U.S. Coast Guard,
Boating Statistics 1992 (1992) 12

No. 93-1098

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

NATURE OF NMMA'S INTEREST

This is stated in the Motion which precedes this Brief.

INTRODUCTION

The NMMA respectfully submits this brief as amicus curiae in support of the Petition for a Writ of Certiorari filed by Outboard Marine Corporation.

STATEMENT OF THE CASE

The NMMA hereby adopts and incorporates as if set forth herein the Statement of Facts and Procedural History contained in OMC's Petition for a Writ of Certiorari.

ARGUMENT

I. The Illinois Appellate Court Erroneously Ruled That The Fatal Injury Of A Passenger On A Recreational Boat Being Operated On Navigable Waters When She Was Thrown Or Fell Overboard And Came Into Contact With The Propeller Of The Boat's Outboard Motor Did Not Bear A Substantial Relationship To Traditional Maritime Activity And Thereby Unjustifiably Refused To Apply Maritime Law.

As explained herein, this Court has invested much interest in the determination of the scope of maritime law. To protect commercial maritime activities and to provide predictability regarding the events which give rise to liability and in the relief available, this Court has insisted on uniform laws applicable to all commercial vessels on navigable waters. There is no legitimate distinction between a recreational boat and a commercial vessel, and this Court has never found such a distinction under maritime law. In essence, this Court has equated recreational boating with commerce. The Illinois Appellate Court's decision rejects that equation.

The Illinois Appellate Court's decision in this case, that events "involving a pleasure boat" are not subject to maritime law, is inconsistent with decisions of this Court. Moreover, the patent error below represents a deviation from the mandate of uniformity and offers recreational boaters greater and different recovery than would be allowed a similar person on a commercial boat. This Court should expressly declare that recreational boating is "commerce" and therefore subject to maritime law, clarifying any confusion arising from prior cases and simplifying the application of maritime law.

A. Uniform Definition of Maritime Law.

Prior to 1972, courts applied maritime law to all actions which involved an accident that occurred on navigable waterways. The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1866). In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), this Court modified the "locality" test. Executive Jet involved an airplane crash on a navigable waterway, and this Court determined that no maritime interests were furthered by having an aviation matter decided under maritime law. Accordingly, the Executive Jet Court required that in addition to the event occurring on a navigable waterway, the event must bear "a significant relationship to traditional maritime activity." Id. at 268. Subsequently, the principle announced in Executive Jet has been known as the "locality plus" test.

Following Executive Jet, some believed that the locality plus test meant that maritime law only applied to commercial boating. This Court, in Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), rejected that notion and ruled that maritime law applies to recreational boaters. Foremost involved a collision between two small recreational boats on the Amite River in Louisiana, a navigable waterway. No commercial maritime interests were involved. The

Foremost Court applied the nexus requirement established in Executive Jet and emphasized the need for the event to have a "potential disruptive" impact on maritime commerce rather than an actual impact. Id. at 675. The Court held that protection of maritime commerce and other marine related industries cannot be achieved without uniform rules applicable to all vessels operated on navigable waterways, without regard to their participation in any commercial activity. Id. at 674. The Foremost Court explained that:

> The federal interest in protecting maritime commerce. . . . can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . .
>
> We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.

Id. at 674-76.[1]

Following Foremost, some courts believed that the application of maritime law to recreational boaters was limited to circumstances in which there was a navigational error.[2] Because of the continuing confusion concerning the

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[1]See Foremost, 457 U.S. at 676-77 (listing examples of congressional activities that support the Court's call for uniform rules).

[2]See, e.g., Souther v. Thompson, 754 F.2d 151 (4th Cir. 1985).

application of maritime law, this Court addressed the issue again in Sisson v. Ruby, 497 U.S. 358 (1990). Sisson involved a 56 foot pleasure sailboat docked at an entirely recreational marina on Lake Michigan, a navigable waterway. While docked, a fire erupted in the sailboat's washer/dryer unit, destroying Sisson's vessel, several neighboring vessels, and part of the marina. In response to claims filed against him, Sisson sought a declaratory judgment to limit his liability, claiming that maritime law applied to this event. This Court unanimously agreed, ruling that maritime law precluded the application of state law. Id. at 367.

The Sisson Court concluded that maritime law applied to events on navigable waters that (1) pose a "potential hazard to maritime commerce," and (2) arise out of an "activity that bears a substantial relationship to maritime activity." Id. at 362-63. The Court rejected numerous proposals from amicus curiae to limit the scope of this test and called for a broad reading and application of these requirements. First, the Court rejected a narrow "fact dependent" analysis of the potential disruptive effect on maritime commerce, stating:

> We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the actual effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the Ultorian more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an activity is likely

> to disrupt commercial activity. Here, the general features - a fire on a vessel docked at a marina on navigable waters - plainly satisfy the requirement of potential disruption to commercial maritime activity.

Id. at 363 (emphasis added). Thus, the purely recreational nature of the case was completely irrelevant.

Second, the Court likewise broadly interpreted the requirement that the event bear a substantial relationship to traditional maritime activity. The Court stated:

> Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. . . . Thus, in this case, we need not ascertain the precise cause of the fire to determine what "activity" Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters. [Footnote omitted.]

Id. at 364-65. Consistent with its refusal to consider the specific facts and its goal of uniformity, the Sisson Court expressly rejected any "navigational error" requirement by stating:

> a narrow focus on navigation would not serve the federal policies that underlie our jurisdictional test. The fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce," . . . and we have said that that interest cannot be

> fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct." [Citation omitted.] The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

Id. at 367 (emphasis added). Thus, the Sisson Court explained that, under the required broad analysis, navigation is not the sole traditional maritime activity. In fact, Sisson suggested that it is difficult to name an activity of a boat in water that would not constitute a traditional maritime activity.[3]

B. Application of Maritime Law.

Many courts following Sisson have attempted to maintain uniformity and have found that a variety of events involving recreational boats on navigable waters are within maritime law.[4] For example, in Complaint of Bird, 794 F. Supp. 575

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[3]The concurring judges in Sisson agreed. Sisson, 497 U.S. at 374 (Scalia, White, J.J., concurring). They explained that

> a vessel engages in traditional maritime activity for these purposes when it navigates, as in Foremost, when it lies in dock, as in the present case, and when it does anything else (e.g., dropping anchor) that vessels normally do in navigable waters. It would be more straightforward to jettison the "traditional maritime activity" analysis entirely, and to return (for vessels) to the simple locality test. . . .

Id.

[4]See Petitioner's Petition for a Writ of Certiorari, pp. 14-15 (discussing decisions by other courts applying maritime law to a variety of situations with which the decision in the present case conflicts).

(D.S.C. 1992), the court held that maritime law applied to a claim by a passenger on a recreational boat who was pushed overboard by another passenger while the boat was anchored in shallow water near a tributary of the North Edisto River. After conducting the abstract analysis required by Sisson, the court concluded that the loss of a passenger overboard "would potentially have an impact on maritime commerce." Id. at 580. The court stated that it

> may not limit its inquiry to whether there is the potential of disruption of commercial maritime activity in the tributary, or even anywhere in the North Edisto River. The court instead must remove the scene of the accident to the busiest of maritime thoroughfares and then ask whether a passenger thrown overboard from a pleasure craft on that major thoroughfare has the potential of disrupting maritime activity.

Id. The court also found that the anchoring of a boat in navigable waters (the general conduct from which the action arose) constituted a traditional maritime activity. Id. at 581.

Courts also promote uniformity by holding that maritime law applies to theories such as product liability. In fact, this court recognized product liability actions based on negligence and strict liability as part of the general maritime law in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986). Lower courts included product liability cases in general maritime law as early as 1946. Sieracki v. Seas Shipping Co., 149 F.2d 98 (3d Cir. 1945), aff'd, 328 U.S. 85 (1946). Despite the decision in East River, the plaintiffs in Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988), aff'd in part, rev'd in part on other grounds, 894 F.2d 804 (6th Cir. 1990), argued that maritime law should not

apply to a product liability case because such cases have no connection with traditional maritime activity. The Anderson court expressly stated: "[t]he fact that products liability is involved, however, does not affect the applicability of maritime law. . . ." 692 F. Supp. at 768. Moreover, the Second Circuit Court of Appeals recently noted that general maritime law "includes elements adopted from the law of products liability" in a case in which a minor was fatally injured when the personal watercraft he was operating collided with a small outboard motorboat. Wahlstrom v. Kawasaki Heavy Industries, 4 F.3d 1084, 1087 (2d Cir. 1993).

C. Recreational Boating Constitutes a Commercial Maritime Activity.

Throughout the foregoing development of maritime law, the constant goal of this Court has been to achieve uniformity as it applies to commercial and recreational activities. This Court defined maritime law broadly in order to achieve this constitutionally mandated goal. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 402 (1970) (indicating that the Constitution requires that a single body of law apply uniformly and coextensively on all navigable waters).

Accordingly, the fundamental error committed by the Illinois Appellate Court was its decision that maritime law does not apply to recreational boating. Although this Court confronted this issue in both Foremost and Sisson, some confusion obviously remains. Accordingly, the NMMA urges this Court to clarify this issue and rule that recreational boating constitutes a commercial maritime activity. Such a ruling, would, at last, resolve the continuing confusion in many courts as to when maritime law applies to recreational boating. Such a ruling would also be consistent with this Court's ruling in Sisson. In fact, the Seventh Circuit Court of Appeals in Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d

225, 228 n.4 (7th Cir. 1993), has suggested that in Sisson this "Court concluded that aquatic recreation is commerce" by ruling that the fire "plainly satisf[ied]" the requirement that the event pose a potential hazard to commercial activity. This Court should endorse the Seventh Circuit's interpretation of Sisson and reject the restrictive Ninth Circuit view in Delta County Ventures v. Magana, 986 F.2d 1260 (9th Cir. 1993).

The conclusion that "aquatic recreation is commerce" is logical in light of the fact that recreational boating constitutes an important segment of the United States marine industry. Consumers spent over 11 billion dollars in recreational boating industry activities in 1993. NMMA, Boating 1993 2 (1993). These expenses included the cost of new and used boats, motors and engines, accessories, safety equipment, fuel, insurance, docking, maintenance, launching, storage, repairs, and club memberships. Id. To meet these consumer demands, the recreational boating industry employed an estimated 389,600 people in 1993. NMMA Estimate.

According to Coast Guard records, boat sales have steadily increased for the last twenty years. American Red Cross National Boating Survey 23 (1991) [hereinafter National Boating Survey].[5] The Coast Guard currently estimates that there are twenty million recreational boats in the United States. Id. at 25. The recreational boating industry includes motorboats, sailboats, canoes, fishing boats, personal watercraft, and high performance boats. Id. at 21.

Approximately 75,231,000 people participated in recreational boating industry activities in 1993. Boating 1993, at 2. Those participants spend almost five billion passenger hours involved in recreational boating activities each year. National Boating Survey, at 86. These activities occur on "50 million acres of lakes, 633,000 miles of rivers, and along the

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[5]The National Boating Survey was commissioned by the United States Coast Guard.

88,633 miles of coastline in the United States." National Transportation Safety Board, Recreational Boating Safety Study 13 (1993).

As further support for the ruling sought herein, the federal government has treated recreational boating as a commercial maritime activity. Congress has enacted Acts which require that all vessels be designed uniformly, Federal Boat Safety Act, 46 U.S.C. § 4301 (Supp. 1993), and has established a National Boating Safety Advisory Counsel, 46 U.S.C. § 13110 (Supp. 1993), to advise the Coast Guard on safety issues relating to recreational boating. Congress has also established Inland Navigation Rules, 33 U.S.C. § 2001 (1986 and Supp. 1993), which apply to all vessels upon inland waters whether recreational or commercial. The authority to enforce these Acts is vested in the Coast Guard, through the Department of Transportation. The Coast Guard promulgates design and safety regulations applicable to all types and sizes of vessels from seven foot long personal watercraft to 100 foot long barges. Both types of vessels regularly utilize the Mississippi River where the accident occurred. Both the magnitude of the industry and the treatment of the industry by the federal government indicate that recreational boating constitutes commercial maritime activity.

Whether or not this Court rules that recreational boating is maritime commerce, in order to be consistent with Congressional and Coast Guard activity in this field, this Court must make it clear that recreational boaters are governed by the same law which governs commercial maritime activities. As found by this Court in Foremost and Sisson and numerous lower federal courts, recreational boating accidents pose a potential hazard on commercial maritime activities. The impact on maritime commerce, in fact, seems inescapable in light of the 75 million recreational boaters, the 20 million recreational boats, and the 5 billion passenger hours spent

every year on navigable waterways. Necessarily, such an expansive industry results in a large number of accidents.

In 1992, 6,048 recreational boating accidents were reported to the United States Coast Guard. U.S. Dep't of Transp., U.S. Coast Guard, Boating Statistics 1992 11 (1992). Of the reported accidents, 3,278 occurred in navigable waters governed by federal law. Id. at 10. Many recreational boating accidents, however, go unreported each year. The Coast Guard has concluded that they receive reports for only ten percent of all non-fatal accidents while receiving reports for almost all fatal accidents. Id. at 2. For example, in 1989, 6,063 accidents were reported to the Coast Guard. U.S. Dep't of Transp., U.S. Coast Guard, Boating Statistics 1989 13 (1989). A survey conducted by the American Red Cross, however, estimated that a total of 649,673 recreational boat accidents occurred during the 1988-89 recreational boating season. National Boating Survey, at 279. Of these accidents, 236,599 were reportable accidents pursuant to Coast Guard reporting criteria in that they involved death, injury, or property damage. Id. For the same period, the American Red Cross reported that 7,109,000 recreational boaters were involved in actual critical incidents or accidents, meaning a boat needed help to reach shore or an accident occurred involving a mechanical failure, grounding, a fall overboard, death, submersion, or other injuries or property damage. Id. at 265. Such rescue activities, of necessity, have the potential to disrupt commercial shipping.

Based on the foregoing, the Illinois Appellate Court's refusal to apply maritime law to the present case because it "involved a pleasure boat" is inconsistent with decisions of this Court and with the realities of the industry. The failure to treat recreational boats and commercial vessels uniformly will have implications on the industry and interject uncertainty to the law which this Court attempted to clarify in Sisson. This Court should grant OMC's Petition for a Writ of Certiorari to

insure continued predictability and stability in the application of maritime laws.

D. Maritime Law Applies to the Present Case.

Finally, under the existing precedent of this Court, maritime law governs the facts of the present case. The decedent, in the present case, was a passenger on a pleasure craft being operated on the Mississippi River when she was thrown or fell overboard, allegedly came into contact with the propeller of the boat's outboard motor, and was fatally injured. Respondents, decedent's father and sister, sued OMC, the manufacturer of the boat's outboard motor, asserting product liability claims based on the lack of a propeller guard.

As discussed above, maritime law has both a locality and a nexus element. This Court in Sisson defined maritime law as the body of law that applies to events involving a vessel on navigable waters that pose a potential hazard to maritime commerce and that bear a substantial relationship to traditional maritime activity. Respondents do not dispute the locality element. They concede that the subject accident involved a vessel on navigable waters.

Respondents and the Illinois Appellate Court, however, contend that maritime law does not apply to this case because it involves recreational boating and therefore lacks a sufficient nexus with traditional maritime activity. Under Sisson, this nexus element consists of two parts. First, the event must pose a potential hazard to maritime commerce. Analyzing the facts broadly, the loss of a passenger overboard satisfies this requirement. See Complaint of Bird, 794 F. Supp. at 580; Foremost, 457 U.S. at 675.

Second, the event must arise out of an activity that bears a substantial relationship to maritime activity. Here, the relevant activity, defined in general terms as mandated by Sisson, is the navigation of a recreational boat. As determined

in Foremost, navigation of a recreational boat is substantially related to maritime activity. In fact, both the majority and concurring opinions in Sisson suggest that almost everything done by a boat in navigable waters is related to maritime activity. Accordingly, the Illinois Appellate Court's reliance on Delta County Ventures, Inc. v. Magana, 986 F.2d 1260, is questionable. Magana is the most recent decision in a line of cases involving activities commenced from an anchored vessel which hold that maritime law does not apply essentially because the vessels were not being used as vessels but rather as floating work platforms. Not only is Magana distinguishable on its facts,[6] but in light of Sisson, the survival of this line of cases is in doubt.[7] Therefore, respondents and the Illinois Appellate Court lack any support for their contention that the activity in this case does not bear a substantial relationship to maritime activity.[8] This lack of

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[6]The factual distinctions include: (1) the boat here was in operation when decedent fell overboard while the boat in Magana was anchored, (2) the decedent here was injured when she came into contact with the boat while the injuries in Magana were not caused by the vessel, and (3) the decedent here "fell" overboard while the injured party in Magana "dove" off the boat.

[7]See Magana, 986 F.2d at 1264 (Kozinski, J., dissenting); Complaint of Bird, 794 F. Supp. at 579 (suggesting Sisson limited or overruled theses cases); Coats v. Penrod Drilling Corp., 5 F.3d 877, 885-86 (5th Cir. 1993) (applying maritime law to claims of a worker injured while working on a stationary oil rig in navigable waters).

[8]The Illinois Appellate Court also relied upon Kunreuther v. Outboard Marine Corp., 715 F. Supp. 1304 (E.D. Pa. 1989) ("Kunreuther I"), even though it admitted that the court had withdrawn that opinion. The Kunreuther I court held that Pennsylvania law applied to issues of causation and damages and Jamaica law applied to other issues, including liability, in a wrongful death action arising when the propeller of an outboard motor struck the decedent while she was snorkeling in Jamaican waters. In Kunreuther II, 749 F. Supp. 658 (E.D. Pa. 1990), the court modified its prior decision by ordering that Pennsylvania law be applied to all issues. Ultimately, in Kunreuther III, 757 F. Supp. 633

support caused the Illinois Appellate Court to distort the holding in Magana (that activities off of stationary boats are not governed by maritime law) to the inaccurate statement that "aquatic recreation involving a pleasure boat" is not governed by maritime law. Woltering v. OMC, 615 N.E.2d 86, 88 (Ill. App. 1993). Clearly, this statement directly contradicts decisions of this Court.

Furthermore, nothing about the vessel involved in the present case exempts it from the federal policy of uniformity. The vessel here is a Class 1 vessel under United States Coast Guard standards, and its design is regulated by Coast Guard regulations under the Federal Boat Safety Act, 46 U.S.C. § 4301. Vessels which are far less traditional than this have been held covered by maritime law. See Wahlstrom, 4 F.3d 1084 (involving a personal watercraft). In fact, the design defect (unguarded propeller) alleged by respondents was the subject of extensive United States Coast Guard hearings and a National Boating Safety Advisory Council Report. See Elliott v. Brunswick Corp., 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991); Mowery v. Mercury Marine, 773 F. Supp. 1012 (N.D. Ohio 1991). Thus, to say that this case only concerns a matter of state law and does not implicate the uniformity of maritime law is misleading.[9] Moreover, to draw arbitrary distinctions between whether the decedent "fell" overboard (clearly a traditional maritime event)

(E.D. Pa. 1991), the court completely withdrew the original order and determined DOSHA applied to all issues. Accordingly, the court mistakenly analyzed general maritime law under Executive Jet in Kunreuther I and ultimately applied statutory maritime law in Kunreuther III. Moreover, the facts in Kunreuther I are distinguishable from the facts of the present case.

[9]Although federal maritime law governs cases arising from a vessel on navigable waters, the cases need not be brought in federal court. See "Savings to suitors" clause, 28 U.S.C. § 1333 (1993).

or "dove" overboard (a recreational endeavor) would seem to constitute the exact "line-drawing" rejected by Foremost.

For the reasons stated, the Illinois Appellate Court's decision lacks any basis in law and reaches an incorrect result. The NMMA urges this Court to recognize that the decision below stands as a direct contradiction of this Court's ruling in Sisson and every case that has been decided since Sisson. Accordingly, this Court should grant OMC's Petition for a Writ of Certiorari, reverse the Illinois Appellate Court's finding that maritime law does not apply to this case, and affirm the trial court's entry of summary judgment in OMC's favor.

II. The Illinois Appellate Court Erroneously Reversed The Trial Court's Finding That Decedent's Nondependent Parent And Sibling Could Not Recover Loss Of Society Damages Under Maritime Law.

If this Court determines that maritime law applies, this Court must also reverse the Illinois Appellate Court's holding that respondents may recover loss of society damages. Consistent with the policy of uniformity advocated above, this Court created a general maritime wrongful death cause of action in Moragne v. States Marine Lines, Inc., 398 U.S. at 378, to parallel the exclusive remedies provided for under the Jones Act, 46 U.S.C. § 688 (1988), and the Death on the High Seas Act, 46 U.S.C. § 761 (1988). The Moragne Court called for a uniform remedy for maritime deaths of nonseamen within state territorial waters to have preemptive effect over state wrongful death statutes. 398 U.S. at 378. Accordingly, nondependent survivors of decedents in Moragne actions cannot recover because the federal maritime statutes limit recovery to dependent survivors of seamen. See Truehart v. Blandon, 672 F. Supp. 929, 938 (E.D. La. 1991); Anderson v.

Whittaker Corp., 692 F. Supp. 764, 772; Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So.2d 1151, 1155 (Fla. App. 1992). Similarly, plaintiffs in Moragne actions cannot recover non-pecuniary damages, such as loss of society, because such damages are not available under the federal maritime statutes. Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Recently, the Second Circuit Court of Appeals expressly stated that "[w]e agree with the overwhelming majority of the pertinent federal decisions that nondependent parents cannot recover damages for loss of society in a general maritime action." Wahlstrom, 4 F.3d at 1092.

Although this Court has not ruled on the damages available to nondependent survivors in Moragne actions, prior decisions of this Court and subsequent lower federal courts indicate that respondents in the present case cannot recover loss of society damages in their general maritime wrongful death cause of action. Respondents, decedent's father and sister, were not financially dependent upon the decedent. Furthermore, damages for loss of society constitute non-pecuniary damages disallowed in federal maritime actions.

CONCLUSION

As shown herein, the case at bar presents a model situation for the application of maritime law. The Illinois Appellate Court's decision constitutes a departure from numerous decisions of this Court and of other federal courts. The facts satisfy all of the elements established by this Court in Sisson. Failure to apply maritime law to this case because it "involved a pleasure boat" will disrupt the uniformity mandated by this Court in actions involving vessels on navigable waters. If the Illinois Appellate Court's decision is not reversed, future recreational boating litigants will be uncertain as to what rules govern their conduct and their liability. This case will add unreasonable inconsistency in a

field of law required by both the United States Constitution and this Court to be uniform.

This Court should hear this case in order to clarify the application of maritime law to recreational boating and rule that recreational boating is maritime commerce. In the alternative, this Court should resolve the lingering doubts that exist in lower courts, such as this one, that recreational boating is governed by maritime law to the same extent as any commercial accident on navigable waters.

Because this case presents important questions concerning maritime law and in order to correct the errors created by the Illinois Appellate Court, the NMMA respectfully encourages this Honorable Court to grant OMC's Petition for a Writ of Certiorari, and upon consideration of this case on the merits, to reverse the decision of the Illinois Appellate Court and affirm the finding of the Circuit Court of Madison County that general maritime law applies to the present case and prevents respondents' recovery of loss of society damages.

Respectfully submitted,

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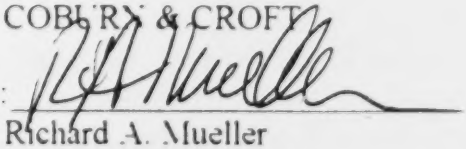
By: 

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(3)

No. 93-1098

In The

Supreme Court of the United States

October Term, 1993

OUTBOARD MARINE CORPORATION,

Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE APPELLATE COURT'S REVERSAL OF PARTIAL SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS ON GROUNDS THAT STATE LAW RATHER THAN ADMIRALTY LAW APPLIED IS A FINAL JUDGMENT.

II. WHETHER FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS.

III. WHETHER NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OBJECTION TO JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

ARGUMENT 2

I. THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW THE STATE APPELLATE COURT'S REVERSAL OF PARTIAL SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS ON GROUNDS THAT STATE LAW RATHER THAN ADMIRALTY LAW APPLIED BECAUSE IT IS NOT A FINAL JUDGMENT 2

II. THE APPELLATE COURT HOLDING THAT STATE LAW RATHER THAN FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS DOES NOT CONTRAVENE SUPREME COURT PRECEDENT ... 6

III. NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Asarco Inc. v. Kadish, 490 U.S. 607 (1989) 4

California v. Rooney, 483 U.S. 307 (1987) 6

Castarelli v. Massachusetts, 421 U.S. 193 (1975) 4

Construction Laborers v. Curry, 371 U.S. 542 (1963) 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ...3, 4

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 5, 6

Flynt v. Ohio, 451 U.S. 617 (1981) 4

Foremost Insurance Corp. v. Richardson, 457 U.S. 668 (1982) 6

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 5

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 10, 11

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)..... 2

Perry v. Thomas, 482 U.S. 483 (1987)..... 6

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 659 (1974) 11

Sisson v. Ruby, 497 U.S. 358 (1990) 7, 9

OTHER COURT CASES

Anderson v. Whittaker Corp., 692 F.Supp. 764 (W.D.Mich. 1988) 9

TABLE OF AUTHORITIES – Continued

Page

Complaint of Bird, 794 F.Supp. 575 (D.S.C. 1992) 8

Delta Country Ventures, Inc. v. Maganu, 986 F.2d 1260 (9th Cir. 1993).....7, 8

Green v. Industrial Helicopter, Inc., 593 S.2d 634 (La. 1992)..... 12

Kunreuther v. Outboard Marine Corp., 715 F.Supp. 1304 (E.D.Pa. 1989)..... 7

Kunreuther v. Outboard Marine Corp., 757 F.Supp. 633 (E.D.Pa. 1991)..... 7

Palmer v. Ribax, Inc., 407 F.Supp. 974 (M.D.Fl. 1976)..... 11

Price v. Price, 929 F.2d 131 (4th Cir. 1991)..... 8

Rebstock v. Sonat Offshore Drilling, 764 F.Supp 75 (E.D.La. 1991)..... 10

St. Hilaire Maye v. Henderson, 469 F.2d 973 (8th Cir. 1974)..... 8

Skidmore v. Grueninger, 506 F.2d 716 (5th Cir. 1975).... 11

Thompson v. Offshore Co., 440 F.Supp. 752 (D.Ct. TX 1977)..... 11

Wahlstrom v. Kawasaki Heavy Industries, Ltd. 800 F.Supp. 1061 (D.Conn. 1992)..... 9

Walker v. Braus and Terra Resources, Inc., 1992 WL 115977 (E.D.La. 1992)..... 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Death On The High Seas Act, 46 U.S.C. § 761 et seq. 11

Federal Boat Safety Act, 46 U.S.C. §§ 4306-4307 4

The Jones Act, 46 U.S.C. § 688 11

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 11

OBJECTION TO JURISDICTION

The judgment which petitioner seeks review of by petition for writ of certiorari is not a final judgment, because it ordered reversal of the partial summary judgment entered by the trial court and remanded the case for further proceedings.

28 U.S.C. § 1257(a) confers upon the United States Supreme Court jurisdiction to review only final judgments rendered by the highest court of a State in which a decision could be had by writ of certiorari. The judgment herein lacks finality. Consequently, there is no jurisdiction to review.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1257. STATE COURTS; CERTIORARI

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

ARGUMENT

I. THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW THE STATE APPELLATE COURT'S REVERSAL OF PARTIAL SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS ON GROUNDS THAT STATE LAW RATHER THAN ADMIRALTY LAW APPLIED BECAUSE IT IS NOT A FINAL JUDGMENT.

The judgment which petitioner seeks to have reviewed does not meet the jurisdictional requirements of 28 U.S.C. § 1257 in two respects.

First, the judgment lacks finality. This is because it does not completely resolve all issues involved in the controversy and does not terminate the litigation. The Illinois Court of Appeal's opinion held state law rather than admiralty law applied to a wrongful death products liability action, which occurred in navigable waters off a pleasure boat. The Appellate Court reversed the trial court's grant of partial summary judgment and remanded the case for further proceedings.

28 U.S.C. § 1257 limits Supreme Court review of state court judgments to final judgments rendered by the highest court of the state in which a decision could be had. The finality requirement serves several purposes:

> (1) it avoids piecemeal review of State Court judgments; (2) it avoids giving opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of State Court determination of federal constitutional issues to leave at a minimum federal intrusion in State affairs. *North Dakota State Board of Pharmacy v.*

Snyder's Drug Stores, Inc., 414 U.S. 156, 158 (1973).

Clearly, the judgment of reversal and remand in this case is not final because there are further proceedings to be conducted in the state court on the merits of the case. Review at this juncture would conflict with the intended purpose of the statute.

This Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) defined four categories of exceptions to the finality requirement, and petitioner has asserted in its jurisdictional statement that this case falls within the exceptions. It has claimed the federal question has been finally decided by the Illinois state courts, that if it prevails on non-federal grounds, this Court will not have another opportunity to review the federal case, that a reversal by this Court would preclude further litigation on claims for recovery on behalf of the survivors and that the constitutionally based policy of uniformity of maritime law would be eroded. (Pet., p. 2)

Respondent disputes those claims. A careful examination of *Cox* and subsequent case law leads to the conclusion that the exceptions set out in *Cox* do not apply to the instant case, and therefore this Court is without jurisdiction to review the issues presented by petitioner at this time.

Petitioner Outboard Marine Corporation's (OMC) claim that the federal question has been decided is only partially correct. The issue of whether maritime or state law applied to this state court cause of action has been ruled on by the state appellate court. However, the loss of

society damages question has not been addressed by the state appellate court.

Moreover OMC omits any mention of additional federal issues being raised. This is a critical omission because the *Cox* exception that an order is final if the federal issue is resolved even though other proceedings remain will not apply if the remaining issues give rise to any other federal issues. *Flynt v. Ohio*, 451 U.S. 617, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981); *Asarco, Inc. v. Kadish*, 490 U.S. 607, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

In the underlying state court complaint, plaintiff has alleged that defendant was negligent for designing and manufacturing the outboard boat motor without a propeller guard. (Pet. A-22-28). An issue of federal preemption involving the Federal Boat Safety Act, 46 U.S.C. § 4306, 4307 is likely to arise in the remaining state court proceedings. Thus, the potential for piece meal review exists, which can be avoided if review of the question presented by petitioner is denied at the present time.

Second, the fact that there will not be another opportunity to review the question presented if petitioner prevails on the merits on non-federal grounds does not qualify the case as a *Cox* exception to finality. *Castarelli v. Massachusetts*, 421 U.S. 193 (1975). It applies only where subsequent review is impossible, regardless of the ultimate outcome of the case. *Cox*, 420 U.S. at 482. Here, if petitioner does not prevail in the subsequent proceedings, it will have the opportunity to seek review on the federal issue.

As for OMC's final claim, namely that the constitutionally based policy of uniformity in maritime law could

be eroded, if the decision is not reversed, the substance of this issue of uniformity is addressed under Points II and III of this brief. The decision of the state appellate court does not erode uniformity of maritime law. The court appropriately applied the two pronged test of admiralty jurisdiction originally established by this Court in *Executive Jet Aviation*, 409 U.S. 249 (1972) and concluded the requisite nexus to traditional maritime activity was absent.

The cases cited by the *Cox* Court in which this exception has been invoked are distinguishable from the instant case. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) involved a freedom of the press "chilling effect situation", and in *Construction Laborers v. Curry*, 371 U.S. 542 (1963), the decision to take jurisdiction relied in part on the fact that the litigation was concluded as a practical matter because the petitioner had no other defenses to the injunction which had been authorized by the state court.

The second respect in which the jurisdictional requirement of 28 U.S.C. § 1257 has not been met concerns the second issue raised by OMC, which is whether loss of society damages are recoverable under general maritime law.

Assuming arguendo, that this Court accepts jurisdiction of the admiralty versus state law issue, the damage question still cannot be reviewed because it is not a decision of the highest court in the state which could be had.

The intermediate state appellate court did not address this issue and there is no way of knowing how

the Illinois Appellate Court or Illinois Supreme Court would rule. This Court has previously refused jurisdiction over issues which were not reached by the state court on the grounds of prematurity. *California v. Rooney*, 483 U.S. 307 (1987); *Perry v. Thomas*, 482 U.S. 483 (1987). Review of this issue on recoverable damages under general maritime law at this time would be premature. To grant certiorari on the admiralty law question alone would inevitably lead to piece meal review. The statute and its underlying policy considerations compel a denial ~~of the~~ petition for writ of certiorari.

II. THE APPELLATE COURT HOLDING THAT STATE LAW RATHER THAN FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS DOES NOT CONTRAVENE SUPREME COURT PRECEDENT.

The state court appellate opinion in this case properly set forth and applied the test for invoking admiralty jurisdiction (Pet. A-1-7). Three United States Supreme Court decisions established and refined this two pronged test. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) required first a determination of whether the tort occurred in navigable waters and if so, then a determination whether there was a significant relationship between the wrong and traditional maritime activity.

Foremost Insurance Corp. v. Richardson, 457 U.S. 668 (1982) expanded admiralty jurisdiction beyond commercial vessels by holding a collision of two pleasure boats

did bear a significant relationship to traditional maritime activity. And, in *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court concluded a yacht docked at a marina which was destroyed by fire was subject to admiralty jurisdiction in that a substantial relationship to traditional maritime activities existed because the fire had "a potentially disruptive impact on maritime commerce." *Sisson*, 497 U.S. at 363.

It is undisputed that incidents resulting in injuries from pleasure boats are not automatically outside the realm of admiralty jurisdiction simply because they are noncommercial. However, these three cases do not purport to hold all incidents involving pleasure vessels in navigable waters bear a significant relationship to traditional maritime activity.

Admiralty jurisdiction determinations necessarily must be made on a case by case basis. OMC incorrectly alleges the state appellate decision contravenes established Supreme Court precedent and ignores the overwhelming authority supporting admiralty jurisdiction. Clearly, the state court followed the dictates of the United States Supreme Court (See Opinion, Pet. A-1-7). In doing so, it analyzed the precise activity and conduct involved and relied on *Delta Country Ventures, Inc. v. Maganu*, 986 F.2d 1260 (9th Cir. 1993) and *Kunreuther v. Outboard Marine Corp.*, 715 F.Supp. 1304 (E.D. Pa. 1989) in support of its ruling.

Kunreuther v. Outboard Marine Corp., 757 F.Supp. 633 (E.D. Pa. 1991), it held state law and not admiralty law applied to a case alleging a failure to design and equip outboard motors with propeller guards because it did not

bear a significant relationship to traditional maritime activity[1].

With respect to *Maganu*, the Ninth Circuit held that because the underlying purpose of admiralty jurisdiction is the protection of commercial shipping, not every accident in navigable waters that could disrupt maritime commerce would invoke admiralty jurisdiction. The appellate court reasonably concluded that being a passenger in a pleasure boat in an area of the Mississippi River that is used for recreational boating constituted aquatic recreation involving a pleasure boat analogous to the diving or "aquatic recreation off a pleasure boat", in *Maganu*.

While negligent navigation is not a prerequisite to admiralty jurisdiction, it is more likely to trigger that disruptive impact to traditional maritime activity than the factual situation presented in the case at bar and therefore is significant. See *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) where admiralty jurisdiction was invoked only because excessive speed and a failure to secure a pleasure boat resulted in a passenger's injury. The Court stated this was a navigational error.

OMC has cited *St. Hilaire Maye v. Henderson*, 469 F.2d 973 (8th Cir. 1974) as a case with similar facts holding admiralty jurisdiction applied. Yet, this case, was decided before *Sisson*. And, although *Complaint of Bird*, 794 F.Supp. 575 (D.S.C. 1992) found admiralty jurisdiction

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[1] The opinion was later withdrawn on other grounds, i.e. that Death on The High Seas Act applied to the case.

applied where a passenger was pushed overboard, it is not a products case.

The more recent cases relied on by defendant, *Anderson v. Whittaker Corp.*, 692 F.Supp. 764 (W.D. Mich. 1988) and *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 800 F.Supp. 1061 (D.Conn. 1992), for example, involved product defects which, in the case of the former, resulted in an unnavigable vessel, and in the latter resulted in death from a collision with a boat.

In the instant case there was no collision or navigational error causing Stacey Grace, a passenger, to be thrown from the boat causing her to be killed by the defective propeller. Instead, it was the defective design of the propeller which is alleged to have caused her death.

Contrary to petitioner's position that the determination of admiralty jurisdiction cannot consider the facts, without an inquiry into facts involving the incident causing injury, there can be no finding as to whether the wrong bears a significant relationship to traditional maritime activity, which is the second prong of the test. To eliminate a case by case inquiry on this question would in effect return the admiralty jurisdiction test to one based on locality only.

The *Sisson* Court examined the type of event in terms of to its relationship to traditional maritime activity. The state court opinion was not based on the absence of negligent navigation, as suggested by OMC. It was based on the relationship to traditional maritime activity.

The state appellate court's characterization of plaintiff's activity as "aquatic recreation involving a pleasure

boat" and the subsequent conclusion that admiralty jurisdiction does not apply due to the lack of a significant relationship to traditional maritime law is congruous with existent federal law and the case does not warrant review by this Court.

III. NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION.

The state appellate court did not rule on the question of whether loss of society damages were recoverable by a non-dependent parent and sibling under federal maritime law. Thus, it is not a question ripe for review.

However, plaintiff does take exception with OMC's contention that the principles enunciated by this court and consistent lower court authority make it clear that general maritime law bars non-dependent beneficiaries from recovering loss of society damages for the wrongful death of a non-seaman occurring in state territorial waters. (Pet., 20)

A careful review of the relevant case law shows a concerted effort to achieve uniformity between legislative and judicial determinations on what is recoverable in maritime actions involving seamen. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Walker v. Braus and Terra Resources, Inc.*, 1992 WL 115977 (E.D.La. 1992). *Rebstock v. Sonat Offshore Drilling*, 764 F.Supp. 75 (E.D.La. 1991).

Congress has elected to restrict recovery of damages to pecuniary damages in cases involving injuries to seamen, The Jones Act, 46 U.S.C, Section 688, injuries occurring outside state territorial waters, Death on the High Seas Act, 46 U.S.C., Section 761 et seq., and injuries to longshoremen, Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901-950.

Under general maritime law, which is based on common law, there is no such restriction. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 659, 113 S.Ct. 1294, 122 L.Ed.2d 685 (1974). The United States Supreme Court in *Miles*, sought to establish uniformity in recovery by seamen in its decision to prohibit non-pecuniary damages in a seaman's action brought under general maritime law.

The *Miles* decision does not turn on the dependency or non-dependency of the party bringing the action. Under general maritime law there is a split of authority on whether to permit recovery to non-dependent beneficiaries. See *Skidmore v. Grueninger*, 506 F.2d 716, 729 (5th Cir. 1975) (adult child permitted to recovery); *Thompson v. Offshore Co.*, 440 F.Supp. 752 (D.Ct. TX 1977), and *Palmer v. Ribox, Inc.*, 407 F.Supp. 974 (M.D.Fl. 1976) (non-dependent parents permitted to recover).

There has been no pronouncement from the United States Supreme Court limiting recovery in a non-seaman action brought under general maritime law by non-dependent survivors.

Conversely, the Illinois courts have expressly recognized recovery of loss of society damages in state wrongful death actions by non-dependent parents and siblings.

Federal maritime law may be supplemented by non-conflicting state law where there is no express provision governing a specific question. *Green v. Industrial Helicopter, Inc.*, 593 S.2d 634 (La. 1992). Because no conflict exists herein, recovery of loss of society damages by a non-dependent survivor is permissible where a recreational boat passenger is killed in territorial waters of a state that permits such recovery in its wrongful death actions.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied. The judgment in question lacks finality, thereby depriving this Court of jurisdiction to review. Moreover, it represents a proper application of the admiralty jurisdiction analysis established by this Court, which is not in conflict with the decisions of this Court.

Respectfully submitted,

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No. 93-1098

In the
Supreme Court of the United States
October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
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15

TABLE OF CONTENTS

Page

ARGUMENT 1

A. This Court Recognizes an Exception to the Rule Requiring Finality Where State Courts Have Finally Decided a Federal Issue, Further Federal Review is Unlikely and The State Court's Decision Will Seriously Erode Federal Policy 1

B. This Case Falls Within the Fourth *Cox* Exception to the Rule Requiring Finality 3

C. This Court May Exercise Jurisdiction Even Though Subsequent Review of the Federal Issue is Not Impossible 7

D. The Possibility That Another Federal Law-Based Argument May Be Raised in Future State Court Proceedings Does Not Preclude Jurisdiction Under the Fourth *Cox* Exception 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

ASARCO, Inc. v. Kadish, 490 U.S. 607 (1989) 9

Construction Laborers v. Curry,
371 U.S. 542 (1963) 3, 7, 8

Costarelli v. Massachusetts, 421 U.S. 193 (1975) 7, 8

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 2, 3, 5, 7-9

Flynt v. Ohio, 451 U.S. 617 (1981) 10

Fort Wayne Books v. Indiana, 489 U.S. 46 (1989) 3, 5

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 3, 6

Mercantile Nat'l Bank v. Langdeau,
371 U.S. 555 (1963) 3, 7

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 5

Moragne v. States Marine Lines, 398 U.S. 375 (1970),
quoting The Lottawanna, 88 U.S. (21 Wall.) 558
(1874) 4

*North Dakota State Board of Pharmacy v. Snyder's Drug
Stores, Inc.*, 414 U.S. 156 (1973) 2, 8

Page

Other Authority

28 U.S.C. § 1257(a) 1

Petitioner Outboard Marine Corporation ("OMC") submits this reply brief in support of its Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District. Respondent challenges this Court's jurisdiction over this matter on the grounds that the decision appealed from is not "final" within the meaning of 28 U.S.C. § 1257(a) because further proceedings are to take place in state court. However, this case falls squarely within a well-established exception to the finality requirement, and review by this Court is appropriate.

ARGUMENT

THIS COURT HAS JURISDICTION OVER THIS CASE BECAUSE THE FEDERAL ISSUE PRESENTED HAS BEEN FINALLY DECIDED BY THE STATE COURTS OF ILLINOIS, FURTHER REVIEW OF THE DECISION ON THE FEDERAL ISSUE IS UNLIKELY AND FAILURE TO REVIEW THIS DECISION WILL SERIOUSLY ERODE FEDERAL POLICY.

A. This Court Recognizes an Exception to the Rule Requiring Finality Where State Courts Have Finally Decided a Federal Issue, Further Federal Review is Unlikely and The State Court's Decision Will Seriously Erode Federal Policy.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . ." The finality prerequisite is intended to preclude piecemeal review of state court judgments, ensure that federal courts render decision only where a case or controversy is present and minimize federal intrusion into the

operation of state courts. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 158 (1973).

Respondent contends the decision from which petitioner appeals is not a final judgment or decree because the Illinois Court of Appeals (and, by denying review, the Illinois Supreme Court) reversed the order granting partial summary judgment and remanded for further proceedings. This Court has long recognized, however, that the mere pendency of further state court proceedings does not preclude a finding that the state court judgment is final. Finality is not to be determined mechanically, but pragmatically, accounting for significant policy concerns implicated by the particular decision at issue. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975).

Cox set forth four "exceptions" to the rule of finality long recognized by this Court. Of particular significance here is the fourth exception:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously

> erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83. *See also Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Construction Laborers v. Curry*, 371 U.S. 542 (1963). This case falls squarely within that exception.

B. This Case Falls Within the Fourth *Cox* Exception to the Rule Requiring Finality.

Cox recognizes that this Court has jurisdiction over a state court decision, despite further state court action to come, if (1) the state courts have finally decided the federal issue, (2) the petitioner might prevail on nonfederal grounds in further state court actions and thus render review of the federal issue unnecessary, (3) reversal of the state court decision would preclude further litigation on the cause of action, and (4) refusing review would seriously erode federal policy. This case meets each criterion.

First, the Illinois courts have fully decided the federal issue of whether federal maritime law applies to this action. The trial court determined federal maritime law did apply, and granted OMC's motion for summary judgment. The Illinois Court of Appeals erroneously reached a different conclusion and reversed the trial court, and the Illinois Supreme Court denied OMC leave to appeal the Court of Appeals' decision. There is no remaining avenue for review of the federal issue in the Illinois judicial system.

Second, subsequent state court proceedings may preclude later review of the federal issue. Further state proceedings are pending. The Court of Appeals reversed an order granting summary judgment and remanded this case for continued litigation. OMC could prevail in the state court action on nonfederal grounds. For instance, OMC might win on the merits of respondent's product liability claim, which the Court of Appeals has incorrectly decided is governed by state law. If OMC prevails on the merits, OMC will not need, or even be permitted, to seek further review of the Court of Appeals' erroneous interpretation of the scope of federal maritime law. The Court of Appeals decision would thus remain in effect because additional review would be not only unnecessary, but unavailable.

Third, this Court can preclude further litigation on this cause of action by reversing the Court of Appeals. The trial court granted summary judgment on respondent's wrongful death cause of action seeking loss of society damages. If this Court reverses the Court of Appeals, it will in essence reinstate that summary judgment, barring additional litigation on that cause of action.

Finally, refusing to review the Court of Appeals' decision would seriously erode the significant federal policy interest in promoting uniform application of maritime law across the country. The value of uniform maritime law is substantial, and the principle of uniformity is constitutionally based. *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970), *quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). As the Petition and the Brief of *Amicus Curiae* demonstrate, the Court of Appeals' decision undermines this principle by promoting a fact-dependent method of determining the applicability of maritime law. The very existence of this anomalous state court decision, which flies in the face of

this Court's previous decisions and erodes the federal policy of uniformity, justifies the exercise of this Court's jurisdiction pursuant to 28 U.S.C. § 1257. *See Cox*, 420 U.S. at 485-86 (failure to address important federal question would harm federal interest in freedom of the press); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (state court decision created unsettled constitutional posture that could harm federal interest in freedom of the press).

Two recent cases establish that the fourth *Cox* exception is appropriately applied in this case. In *Fort Wayne Books*, a consolidated case involving prosecutions for selling obscene materials, the petitioners were charged with violating the Indiana Racketeer Influenced and Corrupt Organizations Act and challenged this application of the Act on constitutional grounds. The Indiana Supreme Court in one case upheld this application of the Act and in another case refused to review a Court of Appeals decision finding the charge constitutional. This Court found jurisdiction:

> This case clearly satisfies the first sentence of [the fourth *Cox* exception]: petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the Indiana Court of Appeals holding would bar further prosecution on the RICO counts at issue here. Thus, the only debatable question is whether a refusal to grant immediate review of petitioner's claims "might seriously erode federal policy." . . . Resolution of this important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt.

Fort Wayne Books, 489 U.S. at 55-56.

This Court also found jurisdiction in *Goodyear Atomic*, in which the state of Ohio attempted to subject the operator of a federal nuclear production facility to state workers' compensation regulations. Both the Ohio Court of Appeals and the Ohio Supreme Court reached the conclusion that federal law did not preempt application of state workplace safety regulations unrelated to radiation hazards. This Court independently considered its jurisdiction, and relying upon *Cox*, concluded:

> We believe the present case falls within this fourth category. The federal question whether the additional workers' compensation award is barred by federal law has been finally determined by the Ohio Supreme Court, and a reversal of the Ohio Supreme Court's holding would preclude any further proceedings. In addition, even if appellant prevails before the Industrial Commission on nonfederal grounds, for example, if the Commission determines that there was no violation of the state safety regulation, the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production. The federal pre-emption analysis of the Ohio court sanctions direct state regulation of nonradiological hazards at the . . . only nuclear facility producing nuclear fuel for the Navy's nuclear fleet. Moreover, the decision has important implications for the regulation of federally owned nuclear production facilities in other States.

Goodyear Atomic, 486 U.S. at 179-80.

Similarly, failure to review the Illinois Court of Appeals' decision in this case has ramifications far beyond

the boundaries of Illinois. The Court of Appeals' decision raises the specter of every state court taking off on a fact-bound determination of the applicability of federal maritime law, fragmenting this body of law at a time when this Court has dictated uniformity to be a primary concern. Such a decision would fly in the face of this Court's avowed pragmatic approach to determining finality. *Cox*, 420 U.S. at 486.

C. This Court May Exercise Jurisdiction Even Though Subsequent Review of the Federal Issue is Not Impossible.

Respondent contends that the fourth *Cox* exception "applies only where subsequent review is impossible, regardless of the ultimate outcome of the case," and "if petitioner does not prevail in the subsequent proceedings, it will have the opportunity to seek review on the federal issue." Respondent's Brief in Opposition at 4. However, this Court has consistently granted certiorari in cases despite a theoretical possibility of further review. *See Curry*, 371 U.S. at 550 (explicitly acknowledging the possibility that, absent immediate review by this Court, the petitioner might seek to relitigate the federal issue before the National Labor Relations Board); *Langdeau*, 371 U.S. at 558 (this Court granted immediate review of issue of venue permissible under federal statute; absent immediate review, petitioners could have sought relief after conviction).[1]

[1] In addition, neither case respondent cites supports this proposition. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975), was a case in which the plaintiff never attempted to seek review in the state appellate courts, and this Court based its decision upon the existence of additional avenues for review in state court. This Court did

Although further review of the Court of Appeals' decision in this case is theoretically possible, it is extremely unlikely this Court will ever have another chance to rectify this abuse of federal maritime precedents. The unlikelihood and impracticality of subsequent review renders petitioner's rights under federal maritime law illusory, and thus immediate review is warranted. *Curry*, 371 U.S. at 550.

In addition, even if petitioner can successfully seek review in the future, the Court of Appeals' decision will remain valid in the interim. It will continue to erode the federal policy of uniform maritime law for as long as it takes to litigate this case in state court and seek subsequent review in this Court. As OMC's Petition demonstrated, other plaintiffs are already seizing upon this decision as a means of undermining the application of maritime law. *See* Petition for a Writ of Certiorari at 19. Even temporary disruption of federal interests is a significant threat and is not to be tolerated. *Curry*, 371 U.S. at 550.

D. The Possibility That Another Federal Law-Based Argument May Be Raised in Future State Court Proceedings Does Not Preclude Jurisdiction Under the Fourth *Cox* Exception.

Respondent argues that the possibility that preemption under the Federal Boat Safety Act may be raised as a

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not discuss the existence of federal review subsequent to trial. *Costarelli*, 421 U.S. at 197. Respondent also cites *Cox*, 420 U.S. at 482, but that page contains no discussion of the impossibility of further review, merely an analysis of the *North Dakota Board of Pharmacy* case and the first sentence of exception number four.

defense to plaintiff's claims of negligent design precludes this Court from assuming jurisdiction under the fourth exception to *Cox*. This argument ignores the compelling policy reasons underlying the fourth exception, and misconstrues the case law.

The fourth exception to *Cox* is predicated upon the fundamental necessity that this Court be able to review a case in which a state court decision threatens serious erosion of federal policy if immediate review is not available, and in which there is every likelihood that the Court will have no other opportunity to address and remedy the error of the appellate court. In this case, the Appellate Court decision threatens to erode the uniformity of federal maritime law during any interim period in which it stands uncorrected. The significant likelihood that if review is denied now, the Appellate Court decision will *never* reach this Court means that the erosion may well continue unabated. These facts place this case squarely within the letter and spirit of the fourth exception to *Cox*. The possibility that an unrelated federal issue might arise in later proceedings if summary judgment is not reinstated does not diminish the importance of the policy considerations that call for immediate and certain review of the Appellate Court decision.

The cases cited by respondent do not require a different result. *ASARCO, Inc. v. Kadish*, 490 U.S. 607, 613 (1989), involved the first and second exceptions to *Cox*, not the fourth exception. The first and second exceptions are not premised upon concerns over erosion of federal policy but instead arise in circumstances where the subsequent proceedings "have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Cox*, 420 U.S. at 478.

While *Flynt v. Ohio*, 451 U.S. 617 (1981), the other case cited by respondent, observes that "most" of the cases falling within the four exceptions left no other federal issues to be resolved, this Court has never declared the absence of other federal issues to be an essential prerequisite to accepting review under the fourth exception to *Cox*. Indeed, as is evident from both the majority and dissenting opinions, the principal ground for the decision to dismiss the writ in *Flynt* was the Court's conclusion that "there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward." 451 U.S. at 622. In this case, by contrast, there is an identifiable federal policy -- the uniformity of maritime law -- that will suffer if the erroneous decision of the Appellate Court is not addressed now.

CONCLUSION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Although the Illinois Court of Appeals decision contemplates further proceedings in state court, that decision is still final for jurisdictional purposes. The Illinois courts have finally decided the federal issue of whether maritime law applies to this cause of action. Pending state proceedings might render further review of that decision unnecessary, and failure to review the decision will seriously erode the federal policy of uniform application of maritime law. Consequently, this decision is reviewable under the fourth *Cox* exception to the rule requiring finality, and this Court should grant certiorari to correct the Illinois Court of Appeals' grievous misinterpretation of the scope of maritime law.

Respectfully submitted,

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